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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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MCI TELECOMMUNICATIONS CORPORATION,
*Petitioner,*

v.

UNITED ARAB EMIRATES, MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether promises made by a representative of a foreign state to a United States company pledging that the foreign state would pay debts owed by its citizens if the company agreed not to pursue legal action against them constitute "commercial activity" under the Foreign Sovereign Immunities Act, thereby subjecting the foreign state to suit in United States courts upon breach of the promises.

## RULE 29.6 STATEMENT

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications Corporation.

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## PETITION FOR A WRIT OF CERTIORARI

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MCI Telecommunications Corporation ("MCI") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals, reported at 82 F.3d 658, is reproduced at page 1a of the appendix to this petition ("Pet. App."). The unreported order of the United States District Court for the Western District of Texas denying respondents' motion to set aside the default judgments against them is reproduced at Pet. App. 15a.

## JURISDICTION

The judgment of the court of appeals was rendered on May 13, 1996. The court denied MCI's petition for

rehearing and suggestion for rehearing *en banc* on June 19, 1996.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES

The Foreign Sovereign Immunities Act (FSIA or Act), 28 U.S.C. §§ 1330, 1602-1611, provides in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a). The FSIA defines "commercial activity" as

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

## STATEMENT OF THE CASE

This case arises from express promises made by officials of the United Arab Emirates and its Ministry of Defense (collectively, "UAE") to MCI that the UAE would

reimburse MCI for over $1 million in unauthorized long-distance telephone calls placed by members of the UAE's "Student Battalion" while on a training assignment at a Texas military installation. MCI acted in reliance upon the UAE's promises when it opted at the urging of UAE officials not to pursue criminal and other remedies against the UAE nationals in question. However, once the UAE military personnel responsible for the unauthorized calls were safely beyond the reach of U.S. courts, the UAE officials refused to honor their promise. The court below held that the district court lacked jurisdiction to entertain MCI's action to enforce the UAE's promises to pay because the promises were not "commercial" in character, and therefore did not defeat the UAE's immunity under the FSIA.

On September 23, 1986, the UAE entered into an agreement with the United States Department of Defense for the training of UAE military under the sponsorship of the United States Army at Fort Bliss, Texas ("Military Training Agreement"). R. Vol. II, pp. 316-23. Pursuant to Note 5 of the Military Training Agreement, the UAE assumed responsibility for the debts incurred by members of Student Battalion for their personal living expenses. Note 5 of the Agreement stated that:

> Students will be responsible for payment of charges for transportation, meals, laundry service, and any other services or personal living expenses they incur. Purchaser [UAE] agrees to ensure prompt payment for such expenses.

R. Vol. II, p. 319.

In August 1987, MCI commenced an investigation of unauthorized calling activity made over an unbilled MCI "maintenance circuit." MCI's investigation revealed that the unauthorized calls were being placed from certain lines in Fort Bliss, Texas to the UAE and other overseas destinations. Information obtained from Southwestern

Bell, the local telephone carrier, and from United States Army officials at Fort Bliss revealed that these unbilled calls were being placed by members of the UAE Student Battalion. MCI confirmed from its own records that the identified individuals had made additional, billed calls to the same destinations as the unauthorized calls. R. Vol. I, pp. 92-94. MCI ultimately determined that, beginning around October 1986, the UAE personnel had made more than 40,000 unauthorized long-distance calls worth more than $1 million. Pet. App. 15a, 25a.

Although MCI was prepared to press criminal charges against the members of the Student Battalion who had made the unauthorized calls, it opted to pursue the matter first with the UAE government. On January 6, 1988, MCI representatives met with the UAE's ambassador and military attaché in Washington, D.C. Pet. App. 21a; R. Vol. I, pp. 75-76. At that meeting, the ambassador told the three MCI representatives that if the unauthorized calls were attributable to members of the Student Battalion, the UAE would assume responsibility and would pay MCI for the calls. Pet. App. 21a; R. Vol. I, pp. 76-77. The Ambassador requested that MCI take no further legal action with respect to the matter, and that MCI forward to him information relating to its investigation and its conclusion that the illegal calls were being placed by members of the Student Battalion. Pet. App. 21a; R. Vol. I, pp. 76-77.

As requested, MCI promptly provided the UAE's ambassador with a list of the members of the Student Battalion who made the unauthorized calls and with computer printouts of the call records. Pet. App. 22a; R. Vol. I, p. 77. On January 18, 1988, the ambassador informed MCI that he had transferred the information to the military attaché for investigation. On February 17, 1988, the attaché informed an MCI manager that the UAE would "definitely" compensate MCI for its losses if members of the Student Battalion were involved. R. Vol. I,

p. 78. The UAE requested a written breakdown of the unauthorized calls by destination. Pet. App. 23a; R. Vol. I, pp. 77-78.

Texas law enforcement officials urged MCI to decide whether it would accept restitution as a substitute for criminal prosecution of the members of the Student Battalion who had made the unauthorized calls. Accordingly, MCI requested another meeting with the UAE ambassador. In June 1988, MCI provided the ambassador with a detailed breakdown of the unauthorized calls which MCI had prepared at substantial expense, and indicated the need to resolve the matter expeditiously. Pet. App. 23a; R. Vol. I, pp. 78-79.

At a July 1988 meeting with MCI representatives, the ambassador and military attaché contended that MCI had failed to provide adequate documentation that Student Battalion members had made the illegal calls and that they had not promised MCI any compensation. After again reviewing records provided by MCI, the ambassador stated that 10% of the individuals listed by MCI were not members of the UAE personnel, although he acknowledged that 90% of the individuals were UAE personnel. Pet. App. 23a-24a; R. Vol. I, p. 80.

In August 1988, the UAE informed MCI that it would not honor its agreement to pay for the calls, and refused to meet again with MCI. By that time, all but one of the UAE military personnel whom MCI believed responsible for the unauthorized calls had returned to the UAE. Pet. App. 24a; R. Vol. I, p. 81; R. Vol. II, pp. 344-49.

On May 11, 1989, MCI filed suit in the United States District Court for the Western District of Texas against the UAE, the UAE Ministry of Defense, and the individual members of the UAE's Student Battalion who had made the telephone calls.[1] The complaint sought damages

[1] Jurisdiction was based upon 28 U.S.C. §§ 1330(a) and 1332 (a)(2).

for the unauthorized and unpaid long distance services, on theories including fraud, conversion, quantum meruit, promissory estoppel, and implied contract. Pet. App. 43a-48a. The promissory estoppel and implied contract counts rested on the UAE ambassador's assurance that the UAE would pay MCI for the unauthorized telephone calls made by the members of the Student Battalion, and MCI's reliance on these assurances. Pet. App. 46a-48a. MCI also sought damages under Note 5 of the Military Training Agreement, on the theory that the UAE had breached the agreement by failing to ensure payment by the UAE military trainees for telecommunications services provided to them by MCI. Pet. App. 45a-46a.

MCI was not able to obtain service on the individual defendants.[2] MCI obtained service on the UAE and the Ministry of Defense, but neither filed an answer or otherwise responded to the complaint. At a hearing on October 20, 1989, MCI presented evidence on its damages and expenses as a consequence of the unauthorized telephone calls and the UAE's subsequent conduct. Pet. App. 27a; R. Vol. II, p. 286.

The district court entered default judgments against the UAE Ministry and the UAE on November 7, 1989 and January 5, 1990, respectively. Pet. App. 28a, 29a. More than three years later, on May 21, 1993, the UAE and the UAE Ministry moved to vacate the default judgments on the ground that the district court had lacked subject matter jurisdiction under the FSIA. The district court ruled that the UAE and the UAE Ministry of Defense were not entitled to sovereign immunity because their actions in promising to reimburse MCI for the unauthorized calls fell within the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a)(2). Pet. App. 15a. The court reasoned that these promises were com-

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[2] One individual defendant initially entered an appearance through counsel, but the parties stipulated to dismissal as to him after he returned to the UAE. R. Vol. I, p. 4; R. Vol. II, pp. 344-49.

mercial acts "because private parties would normally make such promises while participating in the market." Pet. App. 17a (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613-14 (1992)).

A divided panel of the Fifth Circuit reversed. The majority held the "commercial activity" exception inapplicable because the UAE's "alleged promises" had been made "through diplomatic channels." Pet. App. 7a. Despite acknowledging that contracts to procure goods and services are ordinarily a form of commercial activity under the FSIA, the court reasoned that "[n]egotiations over the payment of illegal telephone calls" were "not commercial in nature," emphasizing that MCI's purpose in approaching respondents was to recover losses caused by third parties. Pet. App. 8a.[3]

Judge Garza dissented. He concluded that there was "nothing sovereign about UAE's behavior—the alleged making and breaching of a contract with MCI." Pet. App. 14a. According to the dissent, the UAE's promises to MCI amounted to "simply a contract for services which UAE felt it was morally obligated to enter into." Pet. App. 14a. Judge Garza reasoned that the UAE's actions were not authorized by any power peculiar to a sovereign state, but instead that "any private person could have engaged in these actions." Pet. App. 14a.[4]

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[3] The court of appeals unanimously held that Note 5 of the Military Training Agreement could not provide a basis for jurisdiction under the FSIA's commercial activity exception because the agreement as a whole did not relate to the purchase of goods and services and because it was between "two sovereign parties"—the United States and the UAE—rather than between the UAE and MCI. Pet. App. 8a-9a.

[4] Judge Garza also complained that the majority had improperly failed to place the burden of proof for establishing sovereign immunity under the FSIA upon the defendants. Pet. App. 11a.

The court of appeals denied MCI's petition for rehearing and suggestion for rehearing en banc on June 19, 1996. Pet. App. 18a.

## REASONS FOR GRANTING THE WRIT

This case presents important issues concerning the application of the FSIA's commercial activity exception, the "most significant" of the grounds enumerated in the FSIA upon which United States courts may entertain an action against a foreign state or its instrumentality. *See Weltover*, 594 U.S. at 611-12. "The determination of whether particular behavior is 'commercial' is perhaps the most important decision a court faces in an FSIA suit." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

The Fifth Circuit's interpretation of the "commercial activity" exception conflicts with the text of the FSIA, with this Court's teachings in *Weltover* and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), and with the law of other circuits. It creates broad and wholly novel restrictions on the commercial activity exception, and correspondingly expands foreign states' immunity in ways not contemplated by Congress. In a few bold strokes, the court created new propositions of "commercial activity exception" jurisprudence that set the Fifth Circuit apart from the law prevailing in other circuits. In particular, it is now Fifth Circuit law that

- a foreign government's promise to pay is not a commercial act within the meaning of the FSIA if the promise is "made through diplomatic channels";
- a foreign government's promise to pay its citizen-employees' debts to United States citizens is a sovereign act, and cannot be enforced in United States courts;
- a foreign government's promise to undertake an obligation owed by another is not a commercial ac-

tivity unless there is a preexisting contractual relationship between the government and the promisee;

- negotiation, formation, and breach of a contract between a foreign government and a private party is not "commercial activity" unless the parties have an overall commercial relationship or "nexus";

- negotiations between a foreign government and a private party that lack a profit motive—such as negotiations seeking restitution for "illegal" use of services—are not "commercial" within the meaning of the Act.

At the same time, the Fifth Circuit failed to heed the FSIA's instruction, elaborated in *Weltover*, that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose," 28 U.S.C. § 1603(d). The Fifth Circuit also flouted this Court's teaching in *Weltover* that the central inquiry in commercial activity exception cases is whether the "particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" 504 U.S. at 614 (emphasis in original) (citation omitted).

The decision below introduces needless confusion into the interpretation of a provision that already presents ample difficulty for courts, *see Nelson*, 507 U.S. at 359; *Export Group v. Reef Indus.*, 54 F.3d 1466, 1473 (9th Cir. 1995), and is likely to lead the Fifth Circuit to results that will diverge sharply from the restrictive view of foreign sovereign immunity that prevails in other circuits. To begin with, the Fifth Circuit is now flatly at odds with the Ninth and District of Columbia Circuits on the issue whether activity undertaken through diplomatic channels can be "commercial" within the meaning of the FSIA. *See Joseph v. Office of the Consulate Gen.*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Transamerican S.S. v. Somali Democratic*

*Republic*, 767 F.2d 998 (D.C. Cir. 1985). The Fifth Circuit is also in conflict with the Second and Seventh Circuits as to whether a foreign government's agreement to guarantee the legal obligations of a third party can be "commercial" activity for FSIA purposes. *See Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989); *Gemini Shipping, Inc. v. Foreign Trade Org. for Chem. & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981).

The particular issues presented by this case are likely to recur with some frequency. Indeed, it is to be expected that promises by diplomatic officials to guarantee the obligations of foreign nationals and foreign corporations will be the subject of continuing litigation in United States courts. More broadly, the Fifth Circuit has set itself on a course likely to lead to a significant expansion of the scope of FSIA immunity in cases arising within its borders. The rules of law announced in the decision below will have application far beyond the particular facts presented here, and will likely bring the Fifth Circuit into conflict with the law prevailing in other circuits on a host of particular FSIA questions. In light of the strong public interest in clear standards in foreign sovereign immunity matters—an interest that gave rise to the FSIA's enactment, *see, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)—review by this Court is plainly warranted.

## I. THE COURT OF APPEALS' SWEEPING HOLDING THAT "PROMISES THROUGH DIPLOMATIC CHANNELS DO NOT CONSTITUTE COMMERCIAL ACTIVITY" IS PLAINLY WRONG AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Fifth Circuit stated a flat rule that "alleged promises made through diplomatic channels do not constitute commercial activity." Pet. App. 7a.[5] That rule departs

[5] The court's observation that the promises here were merely "alleged"—in the sense that they were never proven at trial—is

sharply from the general FSIA principle that the "commercial" or "noncommercial" status of the relevant foreign government *entity* at issue is irrelevant to the immunity question, which instead turns on whether the "cause of action arose out of . . . a commercial *act*." Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 148 (1988) (emphasis added). The mere fact that a promisor is a "diplomatic" official or entity clearly does not defeat immunity, as other Circuits have concluded. *E.g.*, *Holden v. Canadian Consulate*, 1996 U.S. App. LEXIS 20064 (9th Cir. Aug. 9, 1996) (denying consulate's claim of immunity in employment discrimination case because employee's job resembled private post); *Joseph v. Office of the Consulate Gen.*, 830 F.2d 1018 (9th Cir. 1987) (rejecting claim of immunity from suit on consulate's lease of private residence for use by consular officials), *cert. denied*, 485 U.S. 905 (1988); *Transamerican S.S. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (Somali embassy's affirmative efforts to assist Somali agency in dispute with American shipping company defeated immunity under commercial activities exception).

It would be odd indeed to cloak the actions of ambassadors and other diplomatic representatives with immunity because they transact business through "diplomatic channels," while denying immunity to foreign entities that transact business by means of legislation, executive decree, or administrative order—avenues no less sovereign in nature than the agreements of diplomats. *Cf. Weltover*,

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true but immaterial. The court iself recognized that, by opting not to respond to MCI's suit and taking a default judgment instead, the UAE had "los[t] its right to defend on the merits." Pet. App. 6a (citing *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987) (R. B. Ginsburg, J.) and *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982)). In this light, the court was obligated to take MCI's allegations as true.

504 U.S. at 615 (denying immunity based on acts of Argentinean "government"); *Janini v. Kuwait Univ.*, 43 F.3d 1534 (D.C. Cir. 1995) (denying immunity for abrogation of employment contract even though it was accomplished by a governmental decree voiding all employment contracts with non-nationals). The focus is not on *which governmental official* undertakes the allegedly commercial act; as *Weltover* makes clear, the immunity question turns on the "nature" of the act itself. 504 U.S. at 615.

In *Transamerican*, 767 F.2d 998, the D.C. Circuit rejected an argument strikingly similar to that embraced by the panel majority here. There, a Somali-government-owned agency sought to impose special fees on an American shipper for delivering grain at a Somali port. The shipper claimed these fees were unlawful, but decided to pay them in order to free its vessel from detention by the agency, and delivered a check made out to the agency to the Somali embassy in the United States. The embassy, however, refused to accept a check made out to the agency, and instructed that the shipper transfer the funds directly into Somalia's commercial account. The court of appeals in *Transamerican* rejected the claim that the Somali embassy had played a merely "diplomatic" role, and held that the Somali government was subject to suit based on the embassy's commercial activities in helping to collect the payment for the agency. The court explained that "[t]he embassy took an active rather than a passive role in the transaction by refusing to accept payment by a check made out to the Agency and insisting instead on an electronic transfer of funds directly into [Somalia's] own commercial bank account in Washington." 767 F.2d at 1003. The embassy's actions were not the impartial actions of a distinctively governmental "diplomatic" nature, but were "normal commercial functions" of the sort that private banks and collection agencies perform routinely; thus they were not entitled to immunity. *Id. See also Holden*, 1996 U.S. App. LEXIS 20064 at *9.

The Fifth Circuit's decision in the present case is squarely at odds with the D.C. Circuit's approach in *Transamerican*. The UAE ambassador's actions here were more clearly "commercial" in character than the Somali embassy's actions in that case. The UAE's ambassador and its military attaché made promises directly to MCI, a private party, for the purpose of inducing MCI to take specific course of action—refraining from legal action against UAE nationals. This was "active" participation of the plainest sort. As the district court and the dissenting circuit judge recognized, the UAE's actions in promising to pay restitution closely resembled those of a private employer that sought to extricate its overseas employees from legal difficulties in their host country.

The use of "diplomatic channels" might sometimes be relevant to the "commercial activity" question, but it should not have the *per se* immunizing effect it now has in the Fifth Circuit. The panel majority's holding that an ambassador's explicit promise to pay money to a private party is an act of "diplomacy" cloaked with sovereign immunity confirms that its sweeping language immunizing "promises made through diplomatic channels" was no slip of the tongue. Under the decision below, foreign government will be able to escape responsibility for otherwise actionable promises by making them through "diplomatic channels." Equally unfortunate, United States citizens will be loathe to rely on promises by foreign diplomats. The decision below transformed a statute intended to ensure that United States "citizens will have access to the courts in order to resolve ordinary legal disputes," H.R. Rep. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, into a means for foreign diplomats to shield their nationals from having to answer in United States courts for ordinary legal wrongs. This result is plainly inconsistent with the statute, this Court's decisions, and the decisions of other circuits.

## II. THE COURT BELOW APPLIED A NOVEL "COMMERCIAL ACTIVITY" TEST THAT HAS NO BASIS IN THE ACT AND THAT CONFLICTS WITH *WELTOVER, NELSON*, AND THE DECISIONS OF NUMEROUS COURTS OF APPEALS.

A. *Failure to Apply the "Private Person" Test.* A state "engages in commercial activity" under § 1605(a)(2) "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (citation and internal quotation marks omitted); *accord Weltover*, 504 U.S. 607; *Texas Trading & Milling Corp.*, 647 F.2d at 309 ("if the activity is one in which a private person could engage, it is not entitled to immunity"). Courts and commentators have referred to this standard as the "private person" test. *E.g., Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 578 & n.4 (7th Cir. 1989); Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 Yale J. Int'l L. 489, 505-12 (1992).

The panel majority below made a reference to the private person test, Pet. App. 7a & n.5, but never applied it. It did not even purport to consider whether the UAE's actions in promising to pay MCI for the unauthorized telephone calls are "the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Weltover*, 504 U.S. at 416 (emphasis in original, citation omitted). If the court had conducted the proper inquiry, it would necessarily have concluded, as Judge Garza concluded in dissent, Pet. App. 12a-14a, that the UAE's actions here plainly qualify as "commercial activity" under the Act.

Indeed, this is a textbook case in which the complaint describes conduct in which private parties regularly en-

gage.[6] The relevant causes of actions against the UAE—MCI's claims of promissory estoppel and implied contract—turn upon the ambassador's and attaché's promises to pay the telephone charges in question in exchange for MCI's agreement to forgo legal action, and on MCI's reliance on those promises. As with the issuance of bonds in *Weltover*, there is nothing distinctively governmental about the UAE's conduct here "(other than perhaps its purpose) that would cause it always to be classified as jure imperii." *Weltover*, 504 U.S. at 615. The UAE's promises here were "garden variety" offers to settle a dispute. *See ibid.*

According to MCI's complaint (Pet. App. 46a-47a), the UAE offered to pay restitution to MCI in exchange for MCI's agreement to refrain from proceeding against UAE citizen-soldiers. This was a promise of the sort that a private employer might well make to a person injured by one of its employees. Private parties commonly insure or assume others' debts, and they do so both before and after the debts are incurred. A private employer in a foreign country would be particularly likely to agree to debts incurred by its employees, in order to preserve good relations with the host nation or to avoid disruption of its operations.[7] Many parents could be expected to offer payment for illegal or overdue telephone calls placed by their children.

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[6] The court below did not question that, *if* the UAE's promise to repay was a commercial act, MCI's suit was "based upon" a commercial activity within the meaning of § 1605(a)(2). In *Nelson*, the Court explained that an action is "based upon" the elements necessary to establish the claim. 504 U.S. at 615.

[7] As the district court observed, "[i]n the private arena, if a company sent several employees to a foreign nation and those employees engaged in the subject activity, the corporation would likely make similar promises as those made by Ambassador Makarrab and Colonel Mubarak [the military attaché] to protect its image and standing in the foreign nation." Pet. App. 17a.

The panel majority reasoned that because the telephone calls at issue had been "illegal," the UAE's promise to pay for the calls could not be "commercial in nature." Pet. App. 8a. But this notion has no support in the Act or in judicial precedent under it.[8] The settlement of claimed legal wrongs—even of those that are potentially criminal—is a staple of private commerce. Because agreement to pay restitution for an employee's, an associate's, or a family member's unlawful acts is plainly the sort of act in which private parties can and do engage, the UAE's conduct here should plainly have been classified as "commercial" for purposes of § 1605(a)(2).

Although the court referred to the negotiations between the UAE and MCI as "clothed with a diplomatic nature," Pet. App. 8a, it never explained how the UAE's promises to MCI could embody any power "peculiar to sovereigns," *Nelson*, 507 U.S. at 360. In fact, as Judge Garza noted, no essentially sovereign power was implicated here. The fact that a government-to-government arrangement concerning military training was "in the background," *Transamerican*, 767 F.2d at 1003, did not alter the commercial nature of the UAE's specific acts any more than did the sovereign uses to which Argentina put the money raised by the bonds at issue in *Weltover*.

B. *Improper Reliance on Purpose.* The panel majority's decision directly conflicts with the statutory command that the nature of the specific acts in question, and not their overall purpose, is the determinative factor under § 1605(a)(2). *See Weltover*, 504 U.S. at 617. Indeed, the court of appeals' error was particularly flagrant, for the court relied on *private party MCI's* purpose

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[8] In *Transamerican*, 767 F.2d 998, for example, the court did not hesitate to find "commercial activity" even though the surcharges the Somali embassy had helped collect were alleged to be unlawful; nor did the court in *Joseph*, 830 F.2d 1018, consider it relevant that the destruction of property alleged to be the basis of the breach of contract was probably both tortious and criminal.

in concluding that the UAE's acts were not "commercial." The court reasoned that "MCI approached the [UAE] not to form a contract for goods or services, but to try and recover its losses from the unauthorized use of its services by third parties." Pet. App. 8a. Under the plain language of 28 U.S.C. § 1603(d), the parties' purposes and motives are simply "irrelevant to the question of [their] activity's commercial character." *Nelson*, 507 U.S. at 363.

As for the court of appeals' statement that MCI was seeking to "recover its losses" rather than "form a contract for goods or services," this Court specifically stated in *Weltover* that "commercial activity" need not have a "profit motive." 504 U.S. at 614; *accord Rush*, 877 F.2d at 578 n.4 (observing that a profit motive requirement would "virtually eliminate" the commercial activity exception). "[T]he use of profit motive as a threshold requirement for applying the commercial activity exception would be inconsistent with the FSIA's focus on the nature of the transaction at issue rather than its purpose." *Joseph*, 830 F.2d at 1024.

C. *The "Nexus" Requirement.* The court of appeals never denied that a contract existed between the UAE and MCI (indeed, in the face of MCI's allegations and the UAE's default, such a finding would have been difficult to sustain).[9] Instead, the court declared that it could find "no nexus between MCI and Defendants-Appellants sufficient to find a contract or agreement that would be 'commercial' in nature so as to constitute commercial activity." Pet. App. 8a. The Fifth Circuit's new "nexus" requirement is unprecedented and unwarranted: the question is not the larger relationship between MCI and the UAE, but whether the UAE's "particular actions," *Weltover*,

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[9] Judge Garza concluded that, according to MCI's allegations concerning the ambassador's promises, a contract had been formed and breached. Pet. App. 14a.

504 U.S. at 614, were the kind of actions that private parties perform in the market. Before the decision below, it was "clearly settled" that "the conduct of the foreign state giving rise to the claim must be part of a commercial act, but the *relationship on which the suit is based need not be commercial, if by commercial one means a relationship involving commerce.*" Dellapenna, *supra*, at 148 (emphasis added).

Courts of appeals have recognized that contracts between foreign states and United States nationals for the purchase of goods or services presumptively count as "commercial activity" under the Act, with the possible exception of instances in which the subject matter of the contract is inherently governmental. *See Rush*, 877 F.2d at 578-79. *But cf. Weltover*, 504 U.S. at 614-15 (a government's execution of contract to purchase "army boots or even bullets" is commercial activity, because private companies use contracts to acquire goods). The panel majority's decision simply ignored this analytical framework. The court's new "nexus" requirement creates a phantom class of contracts that, while neither based on any articulable sovereign attribute nor dealing in a subject that is inherently governmental, nonetheless fall outside the "commercial activity" exception.[10] In this respect as well, the decision below is bound to sow confusion.

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[10] The contract between the UAE and MCI can reasonably be characterized as a contract for the telecommunications services that had been utilized by the UAE soldiers. *See* Pet. App. 14a (Garza, J., dissenting). In any event, the commercial nature of the UAE's actions does not depend on whether the ambassador's promise to MCI involved a sale of "goods" or "services." Although courts frequently refer to such contracts as the *paradigm* "commercial" contract, *e.g.*, *Weltover*, 504 U.S. at 614-15, such contracts plainly do not exhaust the realm of commercial activities under the FSIA. *E.g.*, *Joseph*, 830 F.2d 1018 (lease); H.R. Rep. No. 94-1487, at 16-17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615-16 (purchasing securities is a commercial activity).

D. *Settlement of Third Party Debts.* The court of appeals concluded that the UAE's "alleged promises" could not be "commercial" in character because the debt owed to MCI was for "services provided to third parties." Pet. App. 8a. But this distinction, once again unsupported by any authority, is flatly inconsistent with the "commercial activity" test as elaborated in *Weltover, Nelson,* and numerous court of appeals decisions. Those decisions make clear that the governing test is whether the activity is one in which private parties could engage in the market. *E.g., Nelson,* 507 U.S. at 360; *Weltover,* 504 U.S. at 613; *Holden,* 1996 U.S. App. LEXIS 20064 at *4-*8; *Janini,* 43 F.3d at 1536. If the answer to that question is in the affirmative, the activity is "commercial" regardless of whether a third party is involved. If the panel majority's emphasis on the "third party" aspect of this transaction was a demand for conformity with common-law contract requirements, it was in direct conflict with *Weltover,* in which this Court observed that "[e]ngaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration." 504 U.S. at 615.[11]

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[11] The court's reference to the affected UAE military personnel as "third parties" ignores the close practical and legal relationship between military personnel stationed overseas and their government. Because of its major financial, logistical, and reputational stake in its soldiers' fate while stationed in the United States, the UAE itself clearly secured a benefit for its promise to pay for the student Battalion members' telephone calls—avoiding the cost and embarrassment of having more than 20 of its soldiers hailed into court in a foreign land. That benefit would very likely have been sufficient to qualify as legal consideration for the UAE's promise. The UAE's clear obligation under Note 5 of the Military Training Agreement to ensure payment by UAE military trainees' personal debts further illustrates that the UAE benefited by virtue of its promise to reimburse MCI—by reimbursing MCI for the unauthorized calls, the UAE would avoid responsibility to the Department of Defense under Note 5.

Under the "private person" standard, the UAE's promise was plainly commercial in character even if one regards the Student Battalion as "third parties." Private parties often undertake to pay or insure others' debts. And while common-law enforceability is *not* a requirement for a commercial act under § 1605(a)(2), *Weltover*, 504 U.S. at 611, it is notable that the UAE here received concrete benefits in exchange for assuming this "third party" debt, *and* that the promisee, MCI, detrimentally relied on the UAE's promise.

Contrary to the court of appeals' view here, Pet. App. 8a, the fact that the UAE did not have a *pre-existing* contractual relationship with MCI did not defeat MCI's claim that the UAE's promise to pay the Student Battalion members' debts was itself a commercial act. Once again, the panel majority's did not apply the appropriate test: whether the UAE's actions were of the sort in which private parties can engage. Promises to assume responsibility for a preexisting debt are regularly made and honored by private parties. *E.g.*, 3 Richard A. Lord, *Williston on Contracts* § 7.31 (4th ed. 1992); Restatement (Second) of Contracts, § 86.

The court's insistence upon a preexisting contractual relationship as a precondition for finding "commercial activity" has no support in decisions under the FSIA. It is also flatly inconsistent with *Gemini Shipping, Inc. v. Foreign Trade Org. for Chem. & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981), in which the court held the commercial activity exception applicable on the basis of Syrian government agencies' guarantee that they would pay demurrages incurred by the private shipper plaintiff (which had no contractual relationship with the agencies) if the shipper was detained at port while executing a contract with another private entity to deliver grain to Syria. *See id.* at 318-19.

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The FSIA leaves it to the courts to "work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental" activities. *Texas Trading*, 647 F.2d at 308-09. Case-by-case adjudication will inevitably produce arguably anomalous results. In many cases, disparities among results—necessary by-products of applying the FSIA's vague language in diverse circumstances—will not require intervention by this Court. Petitioner submits, however, that the decision below merits review because it departs from the entire framework governing "commercial activity" cases, fails to apply the standards recently set forth by this Court in *Weltover* and *Nelson*, and introduces a number of wide-ranging new principles that have no basis in the FSIA and are likely to distort the future growth of the law.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1996

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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No. 95-50161

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff-Appellee,*

v.

SUBHI ALHADHOOD, Captain, *et al.*,
*Defendants.*

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Appeal from the United States District Court
for the Western District of Texas

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May 13, 1996

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Before HIGGINBOTHAM, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

Defendants-Appellants appeal the district court's order denying their motion to vacate default judgment on the basis of their sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"). The district court found that Defendants-Appellants made promises to Plaintiff-Appellee MCI Telecommunications Corporation ("MCI") that qualified as commercial activity under the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2)

because private parties would normally make such promises while participating in the market. We reverse based on our finding that the actions of Defendants-Appellants did not constitute commercial activity under the FSIA.

## I. BACKGROUND

On September 26, 1986, Defendant-Appellant United Arab Emirates ("UAE") entered into an agreement/contract with the United States Department of Defense for the training of UAE military personnel ("Student Battalion") under the sponsorship of the U.S. Army at Fort Bliss, Texas. Note 5 of the agreement addressed the expenses covered by the Student Battalion:

> Students will be responsible for payment of charges for transportation, meals, laundry service, and any other services or personal living expenses they incur. Purchaser agrees to ensure prompt payment for such expenses.

In August 1987, MCI instituted an investigation of unauthorized and unbillable calling activity reported by MCI's Richardson, Texas office. Through its investigation, MCI established that, beginning approximately October 1986, in excess of $1 million in telephone calls using unauthorized codes and dial-up numbers were placed by members of the Student Battalion to the UAE and other overseas locations.

MCI contends that it first attemped to recover its damages through diplomatic channels by meeting with UAE Ambassador Ahmed Salim Al Mokarrab and UAE Military Attache Colonel Mubarak Rashid Al Ghafli at the UAE Embassay in Washington, D.C. on January 6, 1988. MCI asserts that at that meeting Ambassador Mokarrab explicitly told representatives of MCI that if the unauthorized calls were attributable to the Student Battalion the UAE would assume responsibility and pay MCI their damages. MCI contends that the Ambassador requested

that MCI take no further legal action, but instead forward information to him on MCI's investigation.

MCI contends that it took no further legal action in reliance on the Ambassador's statements at the January 6, 1988 meeting.[1] Throughout the early part of 1988, MCI forwarded detailed information regarding the members of the Student Battalion allegedly involved in the unauthorized telephone activity. MCI claims that Ambassador Mokarrab repeatedly delayed any further meetings until July 6, 1988, when Colonel Mubarak stated that he would not assist MCI because MCI failed to prove that any individual Student Battalion member made any of the unauthorized calls. MCI also contends that at that same meeting Ambassador Mokarrab stated that he had never promised MCI compensation. Then in August 1988, the UAE officially informed MCI that it would not compensate MCI for any of the telephone calls.

On May 11, 1989, MCI filed a complaint against the UAE, the UAE Ministry of Defense ("Ministry") and the individual members of the Student Battalion identified as having made the unauthorized calls. Service was obtained upon the UAE and the Ministry only.[2] One of the individual members of the Student Battalion filed an answer, but neither the UAE or the Ministry filed an answer. Because neither the UAE nor the Ministry answered or responded within the required time, default judgments were entered against the Ministry on November 8, 1989 and against the UAE on January 8, 1990.[3]

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[1] Five years later, Ambassador Mokarrab executed an affidavit denying that he made any promises to pay MCI for the unauthorized telephone calls.

[2] All the individual defendants were later dismissed.

[3] Prior to entering default judgments against the UAE and the Ministry, the district court held a hearing at which MCI presented evidence as to the amount of damages suffered and expenses incurred by MCI. MCI also filed a memorandum of law in support of its motion for default judgment on the issue of immunity under the FSIA at the court's request.

On May 21, 1993, the UAE and the Ministry moved to vacate the default judgments on the ground that they were immune from suit under the FSIA. The district court entered an order on February 10, 1995 denying the motion, finding that the UAE and the Ministry were not able to assert sovereign immunity for the unauthorized calls because the promises made by Ambassador Mokarrab and Colonel Mubarak to MCI to pay for the calls qualified as "commercial activity" under that exception to the FSIA. Both the UAE and the Ministry now appeal.

## II. JURISDICTION

This appeal arises from a denial of a motion to vacate default judgments entered against Defendants-Appellants. Separate default judgments were entered against the Ministry on November 8, 1989 and against the UAE on January 8, 1990. Defendants-Appellants filed their motion to vacate on May 21, 1993, more than three years after the last default judgment was entered. In their motion to vacate the default judgments, Defendants-Appellants claimed immunity from suit under the FSIA, and the district court denied the motion based on its finding that their actions fell under the "commercial activity" exception to the FSIA. Immediate appeal, under the collateral order doctrine, is permitted from an order denying sovereign immunity under the FSIA because it raises the issue of the court's subject matter jurisdiction. *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 385 (5th Cir.1991). However, the question raised from the appeal in the instant case is whether entry of default judgment prior to Defendants-Appellants claim of sovereign immunity under the FSIA waives their right to claim immunity or challenge the default judgment entered by the district court on the same ground.

This Court has held in the context of the FSIA that

> [w]hen a defendant foreign state has appeared and asserts legal defenses, albeit after a default judgment

> has been entered, it is important that those defenses be considered carefully and, if possible, that the dispute be resolved on the basis of all relevant legal argument.

*Hester Intern'tl Corp. v. Federal Republic of Nigeria,* 879 F.2d 170, 175 (5th Cir.1989) (quoting *Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543, 1552 (D.C.Cir. 1987)). A claim of sovereign immunity under the FSIA is waived only when the sovereign state fails to assert immunity in a responsive pleading. *See Rodriquez v. Transnave Inc.,* 8 F.3d 284, 287 (5th Cir.1993); *Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C.Cir.1990). Thus, a waiver of sovereign immunity cannot be implied from a foreign state's failure to appear. Such a waiver would be inconsistent with section 1608(e) of the FSIA, which requires the court to satisfy itself that jurisdiction exists prior to entering a default judgment.[4] "[E]ven if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 493-94 n. 20, 103 S.Ct. 1962, 1971 n. 20, 76 L.Ed.2d 81 (1983).

Neither does the FSIA or its legislative history state when sovereign immunity must be raised. The D.C. Circuit has concluded that a foreign state's failure to appear, even after default judgment has been entered, does not constitute a waiver. *Practical Concepts,* 811 F.2d at 1547. In *Practical Concepts,* the Court states that a defendant sovereign state that believes the district court lacks juris-

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[4] Section 1608(e) provides in pertinent part:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

28 U.S.C. § 1608(e).

diction may choose one of two paths; it may appear, raise the jurisdiction objection, and ultimately pursue it on direct appeal; or it may challenge the court's jurisdiction in a collateral proceeding by refraining from appearing, thereby exposing itself to the risk of a default judgment, and asserting the jurisdictional objection when enforcement of the default judgment is attempted. *Id. See also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706, 102 S.Ct. 2099, 2106, 72 L.Ed.2d 492 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."). By deferring its jurisdictional challenge, the foreign state only loses its right to defend on the merits. *Id.* In the instant case, Defendants-Appellants did not file a responsive pleading prior to entry of default judgment; they elected to wait and see if a default judgment would be entered against them. Defendant-Appellants then asserted their claim of sovereign immunity in a collateral proceeding through a motion to vacate the default judgments. Although their appearance might otherwise be characterized as "untimely," we cannot infer a waiver of immunity from Defendants-Appellants' much delayed appearance in this case.

## III. COMMERCIAL ACTIVITY EXCEPTION TO THE FSIA

"We review the district court's conclusions about sovereign immunity *de novo." Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines,* 965 F.2d 1375, 1383 (5th Cir.1992) (citing *Stena,* 923 F.2d at 386). The FSIA provides foreign states immunity from suit in federal and state courts unless a specified exception applies. 28 U.S.C. § 1604. One such exception, "commercial activity," is defined under the Act as "either a regular transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular trans-

action or act, rather than by reference to its purpose." *Id.* *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992). We have stated "that an activity has a commercial nature for purposes of FSIA immunity if it 'is a type that a private person would customarily engage in for profit.' " *Walter Fuller*, 965 F.2d at 1384 (5th Cir.1992) (quoting *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 n. 6 (5th Cir.1985)).[5]

A. *Promises to Pay*

Defendants-Appellants contend that their alleged promises to pay MCI for the unauthorized calls did not make them private players within the market, as defined by the U.S. Supreme Court in *Weltover*, because the non-commercial activity of stealing telephone services did not create a "market" to which their alleged promises could relate. On the other hand, MCI asserts that Defendants-Appellants' promises to pay were made in the context of their attempt to resolve a private dispute, which is exactly the type of activity in which private parties engage. *See United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir.1992) ("[t]he negotiation of contracts, including entry into a settlements agreement, clearly is the type of act performed by private persons"). Thus, MCI argues, the Defendants-Appellants' express promises to pay constituted "commercial activity" within the meaning of § 1605(a)(2).

We find that alleged promises made through diplomatic channels do not constitute commercial activity. As we stated in *Walter Fuller*, "courts typically hold that contracts for the procurement of goods and services are com-

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[5] This approach has been approved by the U.S. Supreme Court in *Weltover*, 504 U.S. at 614, 112 S.Ct. at 2166 ("the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce' ").

mercial rather than governmental in nature." 965 F.2d at 1384 (internal citations omitted). Negotiations over the payment of illegal telephone calls, however, are not commercial in nature. Private parties may engage in talks, negotiations, and may even make promises to resolve disputes, but not all such activity will be deemed "commercial." *See Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 578-79 (7th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989). MCI approached Defendants-Appellants not to form a contract for goods or services, but to try and recover its losses from the unauthorized use of its services by third parties. Thus, we find no nexus between MCI and Defendants-Appellants sufficient to find a contract or agreement that would be "commercial" in nature so to constitute commercial activity. In addition, any attempt to resolve the dispute related to services provided to third parties, and not Defendants-Appellants in this instance, and are clothed with a diplomatic nature, not a commercial one.[6]

B. *Contract for Personal Living Expenses*

Addressed as an alternative argument for affirming the district court's judgment, MCI contends that Note 5 of the military training agreement between the UAE and the United States expressly makes the UAE a guarantor of the payment of personal expenses incurred by the Student Battalion. MCI argues that by agreeing to act as a guarantor for debts incurred by the Student Battalion, which includes telephone calls, the UAE is, like a private party, engaging in commercial activity. Relying on *Weltover*, MCI asserts that the agreement constitutes commercial

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[6] In this regard we note that MCI admits that instead of filing criminal charges against the Student Battalion members who made the unauthorized calls, it sought to recover its losses through "diplomatic channels" at the UAE Embassy. The negotiations were not related to any contract for services between the UAE and MCI, as no such contract was ever in existence.

activity not for its "purpose," but by its "nature"; although the agreement has a governmental purpose, the guarantee contained in Note 5 constitutes commercial activity. *See Weltover*, 504 U.S. at 614, 112 S.Ct. at 2166. MCI also argues that the guaranty in Note 5 is unambiguously written without any limitation for the benefit of all creditors providing services of a personal nature to the Student Battlion. Thus, under Texas law, MCI claims itself as a third-party beneficiary under the agreement.[7] We find no merit in MCI's arguments.

The cases relied on by MCI are inapplicable in that they involve contracts or agreements between a sovereign state and the complaining party for either the sale of goods or services.[8] The contract in this case involves a military training agreement between two sovereign parties, the United States and the UAE. No goods or services were purchased or required to be purchased from MCI under the terms of the contract. Therefore, we find nothing in the nature of this agreement, even considering the provisions of Note 5, that would constitute commercial activity.

C. *Unauthorized Telephone Calls*

As a second alternative argument, MCI contends that because the procuring of telephone services is a basic activity undertaken by private persons on a daily basis, the placing of long distance telephone calls by members of the Student Battalion constitutes "commercial activity" within the meaning of the FSIA. MCI argues that each use of MCI's authorization codes created federal tariff obligations on the caller to pay MCI for the long distance tele-

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[7] *See United States v. Allstate Ins. Co.*, 910 F.2d 1281, 1284 (5th Cir.1990) (citing *Hermann Hosp. v. Liberty Life Assurance Co. of Boston*, 696 S.W.2d 37 (Tex.App.—Hous.1985, error refused n.r.e.)).

[8] *See Hellenic Republic, supra; Gemini Shipping v. Foreign Trade Org.*, 647 F.2d 317 (2d Cir.1981).

phone services procured, and such activity is commercial, even in the context of an implied rather than express contract. MCI asserts that this argument is even stronger in the instant case because the implied agreement to pay MCI for its provision of tariffed telephone services is not permeated by any overriding governmental function or purpose.

We find no merit in MCI's contentions. At first glance, this argument appears as an attempt to apply the "tortious activities" exception to the FSIA, since it involves the actions of the UAE's "employees" (*i.e.*, the Student Battalion).[9] Clearly, the making of unauthorized long distance telephone is not within the Student Battalion's scope of employment. *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir.1994). Even if we were to attempt to apply the commercial activity exception, the nature of the calls, which are stolen, could not be found to be "commercial."

## IV. CONCLUSION

Finding Defendants-Appellants' actions did not constitute "commercial activity" so that Defendants-Appellants are entitled to immunity from suit under the FSIA, we VACATE the default judgment of the district court and DISMISS the case for lack of subject matter jurisdiction.

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[9] The "tortious activities" exception provides in pertinent part:

> (a) A foreign state shall not be immune form the jurisdiction of courts of the United States or of the States in any case—
>
> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . .
>
> 28 U.S.C. § 1605(a)(5).

EMILIO M. GARZA, Circuit Judge, dissenting:

The majority in Part III.A. holds that UAE's actions—"its promises to pay"—did not constitute "commercial activity" under the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2). Because I believe that UAE and MCI's alleged contract negotiations constituted "commercial activity" under the FSIA, I dissent.[1]

My disagreement with the majority opinion begins with its failure to address the burden of proof. Under the FSIA, "[o]nce the defendant alleges that it is a 'foreign state', the plaintiff must produce some facts to show that the commercial activity exception to immunity applies, but the defendant retains the ultimate burden of proof on immunity." *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 533 (5th Cir.), *cert. denied,* 506 U.S. 956, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992). In this case, UAE has the burden of proving that it is immune from suit under the FSIA. However, instead of analyzing whether UAE has met this burden, the majority opinion focuses solely on discrediting MCI's arguments.

"The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 614, S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992). The Court in *Weltover* emphasized that the "commercial activity" exception to the FSIA embodies the restrictive rather than the absolute view of foreign sovereign immunity. *Id.* at 613, 112 S.Ct. at 2165. Pursuant to this restrictive theory, the Court held that "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614, 112 S.Ct. at 2166. The determi-

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[1] I concur in Part II and Parts III.B. and C. of the majority opinion.

native factor is not whether the foreign government is acting to fulfill uniquely sovereign objectives. "Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' " *Id.* (quoting Black's Law Dictionary 270 (6th ed. 1990)).

Applying this rule, the *Weltover* Court held that Argentina had "participated in the bond market in the manner of a private actor," and therefore engaged in a "commercial activity," when it issued bonds to restructure debt. *Id.* at 615-19, 112 S.Ct. at 2167-68. Focusing on the nature of the Argentine government's behavior, not its purpose, the Court rejected the argument that the context in which the Argentine government created the bonds—to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis and to control the nation's critical shortage of foreign exchange—made these bonds "sovereign" instead of "commercial" in nature. *Id.* at 615, 112 S.Ct. at 2167. The Court stated that "it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.*[2]

Because the focus is on the nature of the foreign sovereign's behavior, most contracts entered into by a foreign sovereign will fall within the commercial activity exception.[3] We have previously noted the commercial nature of

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[2] Applying *Weltover*, the Court in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) stressed that a state engages in commercial activity only when it exercises powers that can also be exercised by private citizens, as distinct from those powers that are peculiar to sovereigns. *Id.* at 360, 113 S.Ct. at 1479. Applying this logic, the Court held that Saudi Arabia's alleged wrongful arrest, imprisonment and torture of the plaintiff constituted an abuse of the state's police power, the exercise of which is "peculiarly sovereign in nature." *Id.*

[3] The legislative history of the FSIA specifically states that "a single contract, if of the same character as a contract which might

the making or breaching of a contract. *See Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1386 (5th Cir.1992) holding that the breach of a contract for the sale of aircraft is a commercial activity); *United States v. Moats*, 961 F.2d 1198, 1205 (5th Cir. 1992) ("The negotiation of contracts, including entry into a settlement agreement, clearly is the type of act performed by private persons"); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 389 n. 11 (5th Cir. 1991) ("A single contract or course of dealing executed within this nation's boundaries typically will constitute commercial activity carried on in the United States.").

Other circuits have also noted that a foreign government's formation or breach of a contract will typically constitute commercial activity. In *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Rep.*, 877 F.2d 574 (7th Cir.), *cert. denied*, 493 U.S. 937, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989), the Seventh Circuit stated that although "contracts for purchase or sale of goods or services are presumptively 'commercial activities,' . . . certain contracts, although generally of a type in which a private person could enter, are by their nature governmental, since only a sovereign entity deals in the particular kind of goods or services." 877 F.2d at 578. Examples of non-commercial contracts that the court cited included a contract to allow a private party a license to exploit the state's natural resources and employment contracts between a state and its civil servants or military personnel. *Id.* at 578-79. In *Janini v. Kuwait University*, 43 F.3d 1534, 1537 (D.C.Cir.1995), the D.C. Circuit held that the Kuwait University's unilateral termination of employment contracts was a commercial activity, despite the fact that it was accomplished by a formal decree of abrogation as the result of the Iraqui invasion of Kuwait.

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be made by a private person," is an example of the type of behavior that the "commercial activity" exception was designed to encompass H.R.Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976), U.S.C.C.A.N. 1976, at 6615.

In this case, there is nothing sovereign about UAE's behavior—the alleged making and breaching of a contract with MCI. This is simply a contract for services which UAE felt it was morally obligated to enter into. The fact that the telephone calls were unauthorized, or that UAE had a military training agreement with the United States is irrelevant to the nature of UAE's actions. UAE's actions were not authorized by a power peculiar to a foreign state; the making and breaching of this contract was not the result of UAE's exercise of its police powers or power over the state's resources, or even its power over the military. Instead, any private person could have engaged in these actions.

For the foregoing reasons, I respectfully dissent from the majority opinion, and I would hold that UAE's alleged making and breaching of a contract with MCI constituted "commercial activity" under 28 U.S.C. § 1605(a)(2).

## APPENDIX B

[Filed Feb. 10, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

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No. EP-89-CA-164-H

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff*,

v.

MEDHAT JASSIM ALSOORI,
*Defendant*.

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## ORDER REGARDING MOTION TO VACATE DEFAULT JUDGMENT

This is a civil action for damages for commercial torts allegedly committed by several members of the United Arab Emirates' armed forces (the "Individual Defendants"). Plaintiff MCI Telecommunications Corporation ("MCI") alleged the Individual Defendants made 41,057 unauthorized international and domestic long distance phone calls through MCI's network from Fort Bliss in El Paso, Texas. The Individual Defendants were at Fort Bliss pursuant to a military training agreement between the United Arab Emirates and the United States. MCI also sued the United Arab Emirates (the "UAE") and the Ministry of Defense of the United Arab Emirates (the "Ministry of Defense") alleging they were answerable for the unauthorized phone calls.

Only one defendant, Medhat Jassim Alsoori, is left in the case. The Court dismissed the other Individual Defendants for lack of service of process pursuant to Rule

4(j) of the Federal Rules of Civil Procedure. The UAE and the Ministry of Defense are no longer parties because they never filed answers. The Court entered a default judgment against the Ministry of Defense on November 11, 1989 and against the UAE on January 5, 1990. The UAE and the Ministry of Defense finally responded to the default judgments three and a half years later on May 21, 1993 when they filed a motion to vacate the default judgments entered against them pursuant to Rule 60(b)(4). They base the motion on the claim that the UAE and the Ministry of Defense are immune to suit under the Foreign Sovereign Immunities Act ("FSIA"), 42 U.S.C. § 1602, et seq. This motion is now before the Court for decision.

If a foreign state is entitled to immunity under the FSIA, a court lacks both personal and subject matter jurisdiction over any suit brought against the foreign state and default judgments against it are void. *De Sanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1389 (5th Cir. 1985). The FSIA gives foreign states immunity from suit in the United States unless, among other exceptions, the foreign state engaged in commercial activity. 28 U.S.C. § 1605(a)(2). A foreign state engages in commercial activity if it acts, not as a regulator of a market, but in the manner of a private player within the market. *Republic of Argentina v. Weltover, Inc.,* ——U.S.——, 112 S.Ct. 2160, 2166 (1992).

In the instant case, the Court finds the UAE and the Ministry of Defense are not entitled to foreign sovereign immunity, and, therefore, the default judgments were proper. Ambassador Mokarrab, the UAE's ambassador to the United States, and Colonel Mubarak, the UAE's military attaché in Washington, made certain promises to MCI that qualify as commercial activity on the part of the UAE and the Ministry of Defense. They promised to pay for the unauthorized phone calls made by UAE military personnel if MCI did not seek legal action against the personnel and did not publicize what happened. The prom-

ises were commercial acts because private parties would normally make such promises while participating in the market. *See Republic of Argentina v. Weltover, Inc., supra* at 2166. In the private arena, if a company sent several employees to a foreign nation and those employees engaged in the subject activity, the corporation would likely make similar promises as those made by Ambassador Mokarrab and Colonel Mubarak to protect its image and standing in the foreign nation. The UAE's ambassador and military attache did nothing other than what any private employer would do if its reputation and business depended on the promises. *See United States v. Moats,* 961 F.2d 1198, 1205 (5th Cir. 1992).

It is therefore ORDERED that the motion of Defendants United Arab Emirates and the Ministry of Defense of the United Arab Emirates to vacate the default judgments against them, be, and it is hereby, DENIED.

SIGNED AND ENTERED this 10th day of February, 1995.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

**APPENDIX C**

[Filed Jun. 19, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 95-50161

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff-Appellee*

v.

SUBHI ALHADHOOD, Captain; AL BOUSHI, Captain; MUSTASA IBRAHIM, Captain; AHMED ABBAS, Major; MOHAMMED SAID HASSAN, Major; MOHAMMED SAEED, Sergeant; ABDULLAH AL-SHAMSI, Sergeant, ALY SALEM SIEF, Sergeant; MOHAMMED SAEED, Private; ABDULLATEAF, Private; KHLFAN, Private; KHALED, Private; ABDULLAH ABDUL ALHAMMADI; SALEH ALMANSOUR; JEHAD HASSAN; AYAD HASSAN; MOHAMMED BAKRAD; KOTYBAH AZUAR; MEDHAT JASSIM ALSOORI; SAEED SALEM AL BAAD; MOHAMMED ALISALEH ALAKAR; SALEM ALKAABI; ANGELOS PAPPAS; MOHAMMED ALI; HUSSAN SAYED HASHEM,
*Defendants*

and

THE MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES; STATE OF THE UNITED ARAB EMIRATES,
*Defendants-Appellants*

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Appeal from the United States District Court
for the Western District of Texas, El Paso

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ON SUGGESTION FOR REHEARING EN BANC

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(June 19, 1996)

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Before HIGGINBOTHAM, EMILIO M. GARZA and BENAVIDES, Circuit Judges. PER CURIAM:

(✔) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

**APPENDIX D**

[Filed Aug. 2, 1993]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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No. EP-89-CA-164H

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff,*
v.
CAPTAIN ALHADHOOD, *et al.*,
*Defendants.*

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## AFFIDAVIT

DISTRICT OF COLUMBIA ) ss.

JOHN M. SCORCE, being duly sworn, deposes and says:

1. I am Director of International Regulatory Affairs for Plaintiff MCI Telecommunications Corporation ("MCI"). My office is located at 1801 Pennsylvania Avenue, N.W., Washington, D.C. 20006. The facts that I attest to herein are made upon my personal knowledge and, if called to testify as to these facts in a court of law, I could and would be able to testify competently as to these facts.

2. I submit this Affidavit in support of MCI's Opposition to the Motion of Defendant The United Arab Emirates ("UAE") To Vacate Default Judgments in the above-captioned action.

3. After MCI discovered that the perpetrators of the unauthorized telephone calls were members of the Student Battalion, Air Defense Command, UAE ("Student Battalion") at Fort Bliss, Texas, I was asked by MCI Assistant General Counsel John A. Fraser to attempt to deal with this matter on a diplomatic level. The diplomatic ap-

proach was favored for the following reasons. First, MCI was concerned because the social and military rank of some of the personnel involved could cause unwanted publicity for the UAE, a nation friendly to the United States. Second, MCI was concerned that the enforcement of United States law might disrupt the training schedules for the Student Battalion, thus involving the Departments of Justice, State, and Defense and perhaps raising issues of federal cooperation with Texas officials. Third, the United States Secret Service, through a high-ranking director, requested that MCI consider a diplomatic approach prior to any direct law enforcement contact with UAE personnel.

4. On January 6, 1988, Mr. Fraser, Hassan Shatah, MCI's Manager for the Middle East and South Asia, and I met with Mr. Ahmed Salim Al Mokarrab, who then was Ambassador to the United States for the UAE and Mubarak Rashid Al Ghafli, who then was the Military Attaché at the UAE Embassy, to discuss the matter of the unauthorized calls by the members of the Student Battalion. The meeting was held at the UAE Embassy at 600 New Hampshire Avenue, N.W., in Washington, D.C.

5. We informed Ambassador Mokarrab of the losses and expenses incurred by MCI as a result of the unauthorized telephone calls made by the members of the Student Battalion and of how the calls were made.

6. Contrary to the statement in his Affidavit, Ambassador Mokarrab explicitly told us that if the unauthorized telephone calls were attributable to the members of the Student Battalion, the UAE would assume responsibility for the calls and would pay MCI for such services. At the same time, Ambassador Mokarrab, contrary to the statements made in his Affidavit, specifically requested that MCI take no further legal action with respect to this matter and, instead, that it forward to him information relating to its investigation and its claim that the unauthorized calls were placed by officers and enlisted men of the Student Battalion. Ambassador Mokarrab did not say at this

meeting, or, at any other time before August 1988, that the UAE did not hold itself legally responsible to MCI for the unauthorized telephone calls made by the members of the Student Battalion.

7. Relying on Ambassador Mokarrab's representation at the meeting on January 6, 1988, MCI agreed to forbear bringing legal action against the members of the Student Battalion.

8. On January 12, 1988, I sent Ambassador Mokarrab a list of the 35 members of the Student Battalion who made the unauthorized telephone calls and computer printouts of the call records contained in two volumes. Each volume of the call records had a "key" taped to its insider cover and contained tapes that added up the cost of each unauthorized telephone call.

9. My cover letter submitted with the information discussed in paragraph 8 above again detailed for Ambassador Mokarrab the results of MCI's investigation into the unauthorized calls. My January 12, 1988 letter with the list of Student Battalion members attached is attached hereto as Exhibit 1. Due to their size, the two volumes of call records are not attached to Exhibit 1. MCI will bring these materials to the hearing.

10. On January 18, 1988, Ambassador Mokarrab called me and told me that he had turned the information submitted by MCI over to Colonel Mubarak for investigation.

11. On February 25, 1988, Marcel Scheidegger, an MCI International Senior Manager, and I met with Colonel Mubarak to explain to him MCI's proof that the members of the Student Battalion had made the unauthorized telephone calls. During this meeting, Colonel Mubarak requested a written breakdown of the unauthorized telephone calls by destination.

12. Although preparing a written breakdown of the unauthorized telephone calls by destination was very expensive and time consuming, MCI prepared the data and delivered it to Ambassador Mokarrab on June 10, 1988. The new data was contained in two reports. As requested by Colonel Mubarak, Report No. 1 sorted the fraudulent telephone calls by the telephone number called and Report No. 2 sorted the calls by date. In addition, both reports contained a listing of the MCI authorization code used, the date the call was made, the digits dialed, and the duration of the call in minutes.

13. While MCI was working with the UAE Embassy to resolve this matter, the law enforcement authorities were fully prepared to arrest the members of the Student Battalion and they were pressuring MCI to make a decision regarding restitution. Since MCI feared that it might lose its chance at both restitution and prosecuting the members of the Student Battalion, MCI pressed for another meeting with Ambassador Mokarrab. However, Ambassador Mokarrab repeatedly delayed scheduling a meeting with MCI, purportedly because Colonel Mubarak was not available.

14. On June 10, 1988, I sent a Ambassador Mokarrab a letter explaining that due to pressure from law enforcement authorities to prosecute certain members of the Student Battalion, MCI was anxious to resolve this matter quickly. Enclosed with this letter was the data requested by Colonel Mubarak at the February 25, 1988 meeting which is discussed in paragraphs 11-12 above. Mr. Scorce's June 10, 1988 letter is attached hereto as Exhibit 2. Due to its large size, the data requested by Colonel Mubarak is not attached to Mr. Scorce's letter. MCI will bring this data to the hearing.

15. Prior to Ambassador Mokarrab's arrival at the meeting, Colonel Mubarak stated that MCI had failed to prove that any individual Student Battalion member made any of the unauthorized telephone calls. He suggested that MCI simply send the Student Battalion members bills

for the calls. Finally, Colonel Mubarak stated that he would not assist MCI due to the lack of proof.

16. When Ambassador Mokarrab arrived at the meeting, he stated that he had never promised MCI any compensation and that MCI's failure to provide proof that the members of the Student Battalion made the calls was "serious."

17. Mr. Fraser and I again reviewed MCI's proof against the list of Student Battalion members which MCI had provided to the Ambassador in January 1988. After reviewing the list, Ambassador Mokarrab and Colonel Mubarak left the room and compared the list with some other list of UAE personnel. After returning to the room, Ambassador Mokarrab stated that 10% of the individuals on MCI's list were not UAE personnel. When asked to respond as to the 90% who were UAE personnel, he said that they had not been prepared for the meeting and that he wanted to adjourn the meeting for four weeks to review the situation. Ambassador Mokarrab never disputed that 90% of the individuals on the list were in fact members of the UAE Student Battalion.

20. In or about August 1988, the UAE informed MCI that the UAE would not honor its agreement to MCI that it would assume responsibility for the use of the unauthorized codes by the officers and enlisted men of the Student Battalion, as previously represented. Ambassador Mokarrab refused to meet again with MCI to discuss this matter.

21. By the time that the UAE informed MCI that it would not honor its agreement to MCI, the officers and enlisted men of the Student Battalion who had made the unauthorized telephone calls had been rotated back to the UAE—where no United States court could obtain personal jurisdiction over them.

FURTHER AFFIANT SAYETH NOT.

/s/ John M. Scorce
JOHN M. SCORCE

## APPENDIX E

[Filed Jun. 11, 1992]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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No. EP-89-CA-164H

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff*,

v.

CAPTAIN ALHADHOOD, *et al.*,
*Defendant*.

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## EX PARTE ORDER OF ATTACHMENT AND EXECUTION

On January 5, 1990, this Court entered Judgment in this action in favor of Plaintiff MCI TELECOMMUNICATIONS CORPORATION ("MCIT") and against Defendant UNITED ARAB EMIRATES in the amount of $1,155,010.39 plus costs of court and post-judgment interests at the prevailing rate from the date of judgment until paid ("Judgment"). The Judgment provided that MCIT shall have "all writs of execution and other process necessary to enforce this judgment." On May 7, 1990, the Judgment was properly served upon Defendant UNITED ARAB EMIRATES pursuant to 28 U.S.C. § 1608.

Pursuant to 28 U.S.C. § 1610(c), the Court has determined that a reasonable period of time has elapsed following entry of the Judgment against the UNITED ARAB EMIRATES and service of the Judgment upon said De-

fendant and that MCIT may therefore attach the property of the UNITED EMIRATES in the United States in aid of execution and may execute upon said property in satisfaction of the Judgment. It is therefore

ORDERED that MCI TELECOMMUNICATIONS CORPORATION may attach the property of Defendant UNITED ARAB EMIRATES in the United States in aid of execution to the extent provided for in 28 U.S.C. § 1610 and may execute upon said property in order to satisfy the Judgment.

Dated this 10th day of June, 1992.

/s/ Harry Lee Hudspeth
United States District Judge

## APPENDIX F

[Filed Jan. 5, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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No. EP-89-CA-164H

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff,*

v.

CAPTAIN SUBHI ALHADHOOD, *et al.*,
*Defendant.*

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JUDGMENT AND ORDER

On the 5th day of January, 1990, came on to be heard the application of Plaintiff MCI TELECOMMUNICATIONS CORPORATION ("MCIT") for entry of judgment against UNITED ARAB EMIRATES. MCIT had previously moved for entry of default against UNITED ARAB EMIRATES and a default was entered by the clerk of the Court on December 7, 1989. The Court finds that at a hearing held on October 20, 1989 in support of MCIT's Motion for Judgment against the MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES, MCIT appeared through counsel and presented both testimonial and documentary evidence as to the amount of damages it suffered and the expenses it incurred as a consequence of the conduct of the MINISTRY OF THE UNITED ARAB EMIRATES. Based upon the pleadings and official records on file in this cause, the Court entered judgment against the MIN-

ISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES and in favor of MCIT in the amount of $1,155,010.39.

The Court having found that the same testimony and documentary evidence introduced on October 20, 1989 supports the entry of default against UNITED ARAB EMIRATES, one of the Defendants herein. It is therefore

ORDERED that judgment be entered against UNITED ARAB EMIRATES in favor of MCI TELECOMMUNICATIONS CORPORATION in the amount of $1,155,010.39. It is further

ORDERED that Plaintiff be granted judgment for post-judgment interest at the prevailing rate from date of judgment until paid and costs of Court. It is further

ORDERED that nothing contained herein shall affect Plaintiff's causes of action against any of the other Defendants named in this cause. It is further

ORDERED that there being no just reason for delay, this final judgment shall be entered against UNITED ARAB EMIRATES pursuant to Fed. R. Civ. P. 54(b). It is further

ORDERED that Plaintiff have all writs of execution and other process necessary to enforce this judgment.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

DATED: January 5, 1990

**APPENDIX G**

[Filed Aug. 28, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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No. EP-89-CA-164H

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff*,

v.

UNITED ARAB EMIRATES, *et al.*,
*Defendants.*

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CLERK'S ENTRY OF DEFAULT
AGAINST THE MINISTRY OF DEFENSE
OF THE UNITED ARAB EMIRATES
AND MEDHAT JASSIM ALSOORI

On the 28th day of August, 1989, came on to be heard Plaintiff's Motion for Entry of Partial Default Judgment against The Ministry of Defense of the United Arab Emirates and Bedhat Jassim Alsoori and Affidavit in Support. Based upon same as well as my review of the pleadings in this matter, I find as follows:

1. On May 11, 1989, MCI filed with this Court a Complaint for Damages against The Ministry of Defense of the United Arab Emirates, Medhat Jassim Alsoori, and others.

2. On May 11, 1989, this Court issued a summons to be served on Defendant Medhat Jassim Alsoori. Said summons was served on this Defendant on July 11, 1989.

The original summons is and has been made an official part of the Court's record in this matter.

3. On May 11, 1989, this Court issued a summons to be served on Defendant The Ministry of Defense of the United Arab Emirates pursuant to 28 U.S.C. § 1608 (a)(3). A certified mail receipt was received and returned on May 25, 1989 as is reflected by item 2 on the Court's docket sheet in this matter. The original certified mail receipt is and has been made an official part of the Court's record in this matter.

4. Over thirty (30) days have passed since Medhat Jassim Alsoori was served and over sixty (60) days have passed since The Ministry of Defense of the United Arab Emirates and Medhat Jassim Alsoori were served with the summons or Complaint in this action. Neither has answered, moved, or otherwise responded to the summons and Complaints.

Accordingly, MCI is entitled to have a default entered against Defendants The Ministry of Defense of the United Arab Emirates and Medhat Jassim Alsoori.

SIGNED AND ENTERED this 28th day of August, 1989.

/s/ William T. [Illegible]
Deputy Clerk of the
United States District Court
for the Western District of
Texas, El Paso Division

## APPENDIX H

[Filed Jan. 11, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

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Civil Action No. EP-89-CA-164

JURY TRIAL DEMANDED

MCI TELECOMMUNICATIONS CORPORATION,
*Plaintiff*,

v.

CAPTAIN SUBHI ALHADHOOD, CAPTAIN AL-BOUSHI, CAPTAIN MUSTASA IBRAHIM, MAJOR AHMED ABBAS, MAJOR MOHAMMED SAID HASSAN, SERGEANT MOHAMMED SAEED, SERGEANT ABDULLAH AL-SHAMSI, SERGEANT ALI SALEM SIEF, PRIVATE MOHAMMED SAEED, PRIVATE ABDULLATEAF, PRIVATE KHLFAN, PRIVATE KHALED, ABDULLAH ABDUL ALHAMMADI, SALEH ALMANSOUR, JEHAD HASSAN, AYAD HASSAN, MOHAMMED BAKRAD, KOTYBAH AZUAR, MEDHAT JASSIM ALSOORI, SAEED SALEM AL BAAD, MOHAMMED ALISALEH ALAKAR, SALEM ALKAABI, ANGELOS PAPPAS, MOHAMMED ALI, HUSSAN SAYED HASHEM, THE MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES, STATE OF THE UNITED ARAB EMIRATES,

*Defendants.*

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### COMPLAINT FOR DAMAGES

MCI Telecommunications Corporation ("MCI"), by and through its counsel of record, complains against the individual defendants named above, the Ministry of De-

fense of The United Emirates ("Ministry of Defense") and the State of the United Arab Emirates ("UAE") representing as follows:

## INTRODUCTION

1. This is an action for injury suffered by MCI as a result of the activities of the individual defendants in their capacity as agents for the Ministry of Defense and the UAE in conspiring to defraud MCI in connection with their obtaining long distance telephone service and converting property of MCI and the refusal of the UAE to ensure payment of the services incurred as required under a written agreement entered into between the United States Department of Defense and the UAE. It is also an action against the individual defendants, the Ministry of Defense and the UAE for money damages suffered by MCI on the basis of services provided to the individual defendants and for damages suffered by MCI as the result of representations made by the UAE with respect to the payment for telephone services improperly obtained by the individual defendants.

## PARTIES

2. MCI is a Delaware corporation organized and existing under the laws of the state of Delaware with its corporate offices located at 1133 19th Street, N.W., Washington, D.C. 20036. MCI is duly authorized to do business within the state of Texas and at all times pertinent to the Complaint was conducting business within the state.

3. Upon information and belief, CAPTAIN SUBHI ALHADHOOD is an officer in the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

4. Upon information and belief, CAPTAIN AL-BOUSHI is an officer in the armed forces of the UAE

who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

5. Upon information and belief, CAPTAIN MUSTASA IBRAHIM is an officer in the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

6. Upon information and belief, MAJOR AHMED ABBAS is an officer in the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

7. Upon information and belief, MAJOR MOHAMMED SAID HASSAN is an officer in the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE, at Fort Bliss, El Paso, Texas.

8. Upon information and belief, SERGEANT MOHAMMED SAEED is a member in the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

9. Upon information and belief, SERGEANT ABDULLAH AL-SHAMSI is a member in the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

10. Upon information and belief, SERGEANT ALI SALEM SIEF is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

11. Upon information and belief, PRIVATE MOHAMMED SAEED is a member of the armed forces of

the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

12. Upon information and belief, PRIVATE ABDULLATEAF is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

13. Upon information and belief, PRIVATE KHLFAN is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

14. Upon information and belief, PRIVATE KHALED is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

15. Upon information and belief, ABDULLA ABDUL ALHAMMADI is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

16. Upon information and belief, SALEH ALMANSOUR is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

17. Upon information and belief, JEHAD HASSAN is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

18. Upon information and belief, AYAD HASSAN is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

19. Upon information and belief, MOHAMMED BAKRAD is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

20. Upon information and belief, KOTYBAH AZUAR is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

21. Upon information and belief, MEDHAT JASSIM ALSOORI is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

22. Upon information and belief, SAEED SALEM AL BAAD is a member of the armed forces of the UAE who is or was previously asigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

23. Upon information and belief, MOHAMMED ALISALEH ALAKAR is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

24. Upon information and belief, SALEM ALKAABI is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

25. Upon information and belief, ANGELOS PAPPAS is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

26. Upon information and belief, MOHAMMED ALI is a member of the armed forces of the UAE who is or

was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

27. Upon information and belief, HUSSAN SAYED HASHEM is a member of the armed forces of the UAE who is or was previously assigned to the Student Battalion, Air Defense Command, UAE at Fort Bliss, El Paso, Texas.

28. THE MINISTRY OF DEFENSE is an agency or instrumentality of the UAE. The Student Battalion, Air Defense Command, UAE is, upon information and belief, a component of the UAE armed forces under the direct control of the Ministry of Defense. The Student Battalion, Air Defense Command, UAE is presently located at Fort Bliss, El Paso, Texas, and the above-referenced individuals are or have been assigned to the Student Battalion in connection with their status as members of the armed forces of the UAE.

29. THE UNITED ARAB EMIRATES is a foreign state which maintains personnel, agencies and instrumentalities within the United States.

## JURISDICTION

30. This Court has jurisdiction over this action with respect to the individual defendants pursuant to 28 U.S.C. § 1332(a)(2), in that the individual defendants are, upon information and belief, citizens or subjects of a foreign state and the amount in dispute exceeds $10,000. This Court has jurisdiction over the Ministry of Defense and the UAE pursuant to 28 U.S.C. § 1330(a) in that the Ministry of Defense is an agency or instrumentality of the UAE and the UAE is a foreign state which, under 28 U.S.C. § 1605-1607, is not entitled to immunity for the acts complained of herein.

31. Venue in this Court with respect to the individual defendants is appropriate pursuant to 28 U.S.C. § 1391 (a) and (d) in that this is the district in which the claims

arose and, upon information and belief, each of the individual defendants is an alien. Venue in this Court is appropriate as to the Ministry of Defense and the UAE pursuant to 28 U.S.C. § 1391(f)(1), in that this is the district in which a substantial portion of the events giving rise to this action occurred.

## FACTS COMMON TO ALL COUNTS

32. MCI is engaged in the business of selling long distance telephone services to the general public. Among the telephone services which MCI makes available to its customers is a service known as "MCI Dial-Up Service". Customers who subscribe to this service agree to pay a prescribed rate for telephone calls made by them through this service and such customers are provided by MCI with a unique, confidential code number (the "authorization code") which enables them to enter into the system.

33. By entering an authorization code into MCI's computer records through the key-pad of a touch tone telephone, MCI customers may obtain long distance telephone service to any foreign country throughout the world and to any area within the United States. Once an authorization code is activated, charges for long distance calls made by an authorized customer will be billed by MCI to that customer's account.

34. Upon information and belief, beginning in approximately October, 1986, officers and enlisted men of the Student Battalion, Air Defense Command, UAE ("Student Battalion, UAE") at Fort Bliss, Texas, including the above named defendants and others, came into possession of one or more MCI authorization codes without the knowledge, consent or authorization of MCI (the "unauthorized codes").

35. At or about the same time, the officers and enlisted men of the Student Battalion, UAE and others came into possession of a number for a maintenance circuit within the MCI telephone system without the knowledge,

consent or authorization of MCI (the "unauthorized circuit"). Because telephone calls made through a maintenance circuit are not charged to a customer of MCI, the telephone calls made by the officers and enlisted men of the Student Battalion, UAE and others using the unauthorized code numbers and entered through the maintenance circuit went undetected for a substantial period of time.

36. On or about August 17, 1987, MCI first began to investigate the high level of calling activity through the maintenance circuit which had been noted by MCI personnel and which could not be attributed to a particular customer. In connection with its investigation of a potential unauthorized use of MCI's facilities, MCI obtained a trap trace through Southwestern Bell Telephone Company which revealed that telephone calls using the unauthorized codes and unauthorized circuit were being made from telephones maintained in the names of the individual defendants, other telephones located at the Student Battalion, UAE at Fort Bliss, as well as telephones maintained by other individuals in the El Paso community. In addition, as a result of its investigation, MCI was able to establish that during the period from October, 1986 through March, 1988, more than $1,500,000 in calls using the unauthorized codes and unauthorized circuit were placed from the El Paso, Texas area to the UAE and other overseas locations.

37. Because the unauthorized codes were being utilized in connection with an unauthorized circuit, the unauthorized telephone activity was not easily detectable and MCI had no reasonable basis to suspect that its facilities were being improperly and illegally utilized until it began its investigation in August of 1987. During the period from August, 1987 through March, 1988, MCI undertook various measures to prevent individuals who had obtained access to the unauthorized codes from utilizing such codes in the MCI system.

38. The officers and enlisted men of the Student Battalion, UAE agreed to and used one or more of the unauthorized codes and the unauthorized circuit to obtain long distance telephone services without paying MCI for the services and with the intent not to pay for these services.

39. Upon information and belief, the officers and enlisted men of the Student Battalion, UAE, and others at various times gave and transferred the unauthorized code numbers and instructions on their use to other persons, both known and unknown, who used the unauthorized code numbers to obtain long distance telephone services for themselves from MCI without paying for such services. Upon information and belief, those same individuals gave and transferred the unauthorized code numbers and instructions on their use to other individuals who also used the unauthorized code numbers to obtain phone services and/or transferred the unauthorized code numbers in a continuing chain of unauthorized use.

40. Each use of one of the unauthorized code numbers described above constituted a representation to MCI by the user that he was a duly authorized user of the account to which the authorization code was assigned and that the service obtained from MCI through such an authorization code would be paid. In reliance upon this implied representation, MCI was induced to provide, without compensation, long distance telephone services for which it is entitled to receive compensation in an amount which is yet unknown but which exceeds the minimal jurisdictional limits of this Court.

41. On September 23, 1986 the UAE entered into a contract with the United States Department of Defense for the training of the members of the UAE Armed Forces ("Agreement"). Note 5 to the Agreement provided that the UAE would ensure prompt payment of any personal expenses incurred by its officers and enlisted men in the United States.

42. The actions by the officers and the enlisted men of the Student Battalion, UAE in obtaining long distance phone services through the use of unauthorized access codes and the UAE's agreement to ensure payment of personal expenses incurred by its officers and enlisted men constitute commercial activity of the Ministry of Defense and the UAE undertaken by its duly authorized agents.

43. As a result of the actions of the officers and enlisted men of the Student Battalion, UAE, MCI has incurred, in addition to the cost of the unauthorized services, additional costs, including, without limitation, costs for replacement of authorization codes which it would not have incurred but for the aforementioned conduct.

## COUNT I

## CONSPIRACY TO DEFRAUD

44. MCI repeats and realleges the allegations of paragraphs 1-43 as if specifically set forth herein.

45. The officers and enlisted men of the Student Battalion, UAE, acting in their capacity as agents of the Ministry of Defense and the UAE, as well as others, conspired together to defraud MCI by obtaining and utilizing access codes for MCI telephone service which they knew were unauthorized, by making the unauthorized codes available to other individuals, by concealing their actions from MCI and by continuing the conspiracy at MCI's expense.

46. Defendants and the other persons to whom unauthorized code numbers were transferred knew that MCI would not provide the long distance telephone services, if MCI knew that the telephone services were being obtained through the use of the unauthorized codes and the unauthorized circuit.

47. Defendants, and the other persons to whom the unauthorized code numbers were transferred, conspired

to misrepresent and conceal the use of the unauthorized codes and the unauthorized circuit from MCI in order to obtain unlawfully long distance telephone services from MCI without paying MCI for the telephone services.

48. Defendants, and the other persons to whom the unauthorized code numbers were transferred, continue to participate in the conspiracy by attempting to conceal the existence of the conspiracy from MCI.

49. As a direct and proximate result of the conspiracy and the acts of the individual defendants, MCI has suffered damage for which each of the individual defendants, the Ministry of Defense and the UAE are jointly and severally liable to MCI in an amount equal to the cost of the services provided by MCI.

50. In addition, because defendants knowingly, intentionally and maliciously sought to defraud MCI, MCI is entitled to recover punitive damages in an amount to be determined by the trier of fact.

## COUNT II

## CONSPIRACY TO CONVERT PROPERTY OF MCI

51. MCI repeats and realleges the allegations of paragraphs 1-50 as if specifically set forth herein.

52. The officers and enlisted men of the Student Battalion, UAE, acting in their capacity as agents of the Ministry of Defense and the UAE, conspired together to unlawfully convert property of MCI by exercising dominion over such property and placing unauthorized calls through MCI's long distance telephone system, by concealing their actions from MCI and by continuing the conspiracy at MCI's expense.

53. Each authorization code is the property of MCI and MCI is the leasee or owner of certain equipment and facilities through which the long distance calls were placed by each individual defendant and each of the other per-

sons to whom the unauthorized code numbers as described above were transmitted.

54. Each use of the unauthorized code numbers of MCI equipment and facilities as described above constituted an unlawful and unauthorized act of dominion over the property of MCI inconsistent with the rights of MCI.

55. Defendants, and others to whom the unauthorized codes were transferred, continue to participate in the conspiracy to convert property of MCI by attemtping to conceal the existence of the conspiracy from MCI.

56. As a direct and proximate result of the conspiracy to convert property of MCI, MCI has suffered damages for which each individual defendant, the Ministry of Defense and the UAE are jointly and severally liable to MCI in an amount equal to the cost of the services provided by MCI.

57. In addition, because defendants knowingly, intentionally and maliciously sought to convert property of MCI, MCI is entitled to recover punitive damages in an amount to be determined by the trier of fact.

## COUNT III

## AIDING AND IN ABETTING FRAUD AND CONVERSION

58. MCI repeats and realleges the allegations of paragraphs 1-57 as if specifically set forth herein.

59. Having received unauthorized codes, the officers and enlisted men of the Student Battalion, UAE had actual knowledge that the codes were unauthorized and that use of the codes constituted a fraud against MCI and conversion of its property. By agreeing to and by transferring the unauthorized code numbers and instructions on their use to other individuals, both known and unknown, the individual defendants substantially aided and abetted these other individuals in defrauding MCI and converting property belonging to MCI.

60. The individual defendants acted knowingly in aiding and abetting other individuals to defraud MCI and to convert its property.

61. MCI was injured as a direct and proximate result of the defendants' tortuous activity and MCI has suffered damages for which each individual defendant, the Ministry of Defense and the UAE are jointly and severally liable to MCI in an amount equal to the cost of the services provided by MCI.

62. In addition, because defendants knowingly and intentionally aided and abetted others to defraud MCI and convert its property, MCI is entitled to recover punitive damages in an amount to be determined by the trier of fact.

## COUNT IV

## FRAUD

63. MCI repeats and realleges the allegations set forth in paragraphs 1-62 as if specifically set forth herein.

64. Each of the individual defendants herein represented to MCI that he was a duly authorized user of its authorization codes and that the services obtained from MCI through such use would be paid.

65. These material representations to MCI were false when made and were known by the individual defendants to be false at the time they obtained long distance telephone services through the use of the unauthorized code numbers.

66. Each individual defendant misrepresented said material facts to MCI for the specific purpose of inducing MCI to provide long distance telephone services without paying MCI for the services.

67. MCI reasonably relied upon the material misrepresentations of each individual defendant by providing long distance telephone services to each such defendant.

68. As a direct and proximate result of the material misrepresentation of each individual defendant, MCI has suffered damages for which each individual defendant, the Ministry of Defense and the UAE are jointly and severally liable to MCI in an amount equal to the cost of the services provided by MCI.

69. In addition, because defendants knowingly, intentionally and maliciously made such misrepresentations, MCI is entitled to recover punitive damages in an amount to be determined by the trier of fact.

## COUNT V

## CONVERSION

70. MCI repeats and realleges the allegation set forth in paragraphs 1-69 as if specifically set forth herein.

71. Each authorization code utilized by the individual defendants is the property of MCI.

72. Each use of the unauthorized codes constituted an unlawful and unauthorized act of dominion over the property of MCI inconsistent with the rights of MCI. As a result of these activities, each of the individual defendants has converted and/or misappropriated the property of MCI to his own use and benefit.

73. As a direct and proximate result of the activities of the defendants, MCI has suffered damages for which each individual defendant, the Ministry of Defense and the UAE are jointly and severally liable to MCI in an amount equal to the cost of the services provided by MCI.

74. In addition, because defendants acted knowingly, intentionally and maliciously, MCI is entitled to punitive damages in an amount to be determined by the trier of fact.

## COUNT VI

## QUANTUM MERUIT

75. MCI repeats and realleges the allegations set forth in paragraphs 1-74 as if specifically set forth herein.

76. During the period from October of 1986 through March of 1988, MCI provided long distance telephone services to each of the individual defendants at the request of various members of the Student Battalion, UAE, and each of the officers and enlisted men in their capacity as agents of the Ministry of Defense and the UAE implicitly agreed to pay MCI the charges lawfully imposed for services pursuant to tariffs duly filed.

77. During the period from October of 1986 through March of 1988, the individual defendants, in their capacities as officers and enlisted men of the Student Battalion, UAE, enjoyed the benefits of long distance telephone services provided to them by MCI. Each individual defendant, the Ministry of Defense and the UAE has failed to and refused to pay MCI for the services provided to the officers and enlisted men of the Student Battalion, UAE.

78. As a direct result thereof, MCI has suffered damages for which each individual defendant, the Ministry of Defense and the UAE is jointly and severally liable to MCI in an amount equal to the value of the services provided by MCI.

## COUNT VII

## MONEY DUE AND OWING

79. MCI repeats and realleges the allegations set forth in paragraphs 1-78 as if specifically set forth herein.

80. Pursuant to Note 5 of the Agreement between the UAE and the United States Department of Defense, the UAE agreed to ensure payment of personal expenses incurred by individuals training in the United States under the Agreement.

81. During the period from October 26, 1986 through March 1988, the individual defendants, in their capacities as officers and enlisted men of the Student Battalion, UAE enjoyed the benefits of long distance telephone service provided by MCI. Despite demand, the UAE has failed to ensure payment to MCI for the services provided to the officers and enlisted men of the Student Battalion, UAE as represented in the Agreement between the UAE and the United States Department of Defense.

82. As a direct result thereof, MCI has suffered damages for which the UAE is liable to MCI in an amount equal to the value of the services provided by MCI.

## COUNT VIII

## PROMISSORY ESTOPPEL

83. MCI repeats and realleges the allegations set forth in paragraphs 1-82 as if specifically set forth herein.

84. MCI having discovered, as a result of its investigation, that the officers and enlisted men of the Student Battalion, UAE made extensive use of unauthorized codes to place long distance telephone calls through MCI's communications system, MCI in early 1988 sought to obtain restitution directly from the UAE.

85. In January of 1988, representatives of MCI's International Division met with The Honorable Ahmed Al-Mokarrab, the UAE Ambassador to the United States. At this meeting, the Ambassador told the representatives of MCI that, if the unauthorized telephone calls were attributable to the members of the Student Battalion, UAE, the UAE would assume responsibility for the unauthorized telephone services and pay MCI for such services. At the same time, the Ambassador requested that MCI take no further legal action with respect to this matter and, instead, that it forward to the Ambassador information relating to its investigation and its claim

that the unauthorized calls were placed by officers and enlisted men of the Student Battalion, UAE.

86. These representations were reaffirmed by the Ambassador and by Colonel Mubarak, the military attache for the UAE, between January 1988 and June 1988.

87. As a result of the representations made by Ambassador Al-Mokarrab and Colonel Mubarak, MCI refrained from continuing to pursue its legal rights against the officers and enlisted men in the Student Battalion, UAE and the UAE.

88. In July 1988, a further meeting was held between representatives of MCI and The Honorable Ahmed Al-Mokarrab and Colonel Mubarak. At this meeting the Ambassador requested that MCI refrain from taking action in the case for another month in order for the Ambassador to attempt to finally resolve the matter. In or about August 1988, the UAE informed MCI that the UAE would not honor its agreement to MCI that it would assume responsibility for the use of the unauthorized codes by the officers and enlisted men of the Student Battalion, UAE, as previously represented.

89. Having agreed to assume responsibility for and pay for the unauthorized calls attributable to the officers and enlisted men of the Student Battalion, UAE, the UAE is bound by the actions of Ambassador Al-Mokarrab and Colonel Mubarak, and MCI is entitled to recovery from the UAE an amount equal to the cost of the services provided by MCI.

## COUNT IX

## IMPLIED CONTRACT

90. MCI repeats and realleges the allegations set forth in paragraphs 1-89 as if specifically set forth herein.

91. Having specifically agreed to assume responsibility for and to pay for the unauthorized calls attributable

to the officers and enlisted men of the Student Battalion, UAE, the UAE assumed full responsibility for the unauthorized telephone service and MCI is entitled to recover from the UAE an amount equal to the value of the services provided by MCI.

WHEREFORE, MCI prays this Court to enter judgment as follows:

A. As to Counts I-VI, MCI demands the following relief against each of the individual defendants, the Ministry of Defense and the UAE jointly and severally:

1. Money damages in excess of $1,500,000 and in such amount as will be determined at trial;
2. Punitive damages in an amount to be determined at trial;
3. Attorney's fees, pre-judgment interest and costs;
4. Such other and further relief as this Court shall deem appropriate and just.

B. As to Counts VII-IX, MCI demands the following relief against the UAE:

1. Damages in an amount in excess of $1,500,000 and in such amount as will be determined at trial; and
2. Attorney's fees, pre-judgment interest and costs;
3. Such other and further relief as this Court shall deem appropriate and just.

Respectfully submitted,

MCI Telecommunications Corporation

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## JURY DEMAND

Plaintiff demands a trial by jury as to all appropriate claims and issues.

Supreme Court, U.S.
FILED
OCT 23 1996
CLERK

(2)

No. 96-434

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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MCI TELECOMMUNICATIONS CORPORATION,
*Petitioner,*

v.

UNITED ARAB EMIRATES, MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF IN OPPOSITION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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No. 96-434

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MCI TELECOMMUNICATIONS CORPORATION,
*Petitioner,*

v.

UNITED ARAB EMIRATES, MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF IN OPPOSITION

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### COUNTERSTATEMENT OF THE CASE

Respondents United Arab Emirates (UAE) and Ministry of Defense of the United Arab Emirates (UAE Ministry of Defense) hereby point out certain misstatements and omissions of fact in the Petitioner's Statement of Facts.

With respect to the September 23, 1986 Military Training Agreement entered into between the UAE and the United States Department of Defense, R. Vol. II, pp. 316-23, the Petitioner, MCI Telecommunications Corp. (MCI) was not a party to that agreement. Moreover, the UAE did not explicitly guarantee payment or assume

responsibility for any debts incurred by members of the UAE Student Battalion for their personal living expenses under any provision of the aforesaid Military Training Agreement. Rather, under Note 5 of the Military Training Agreement, the UAE merely agreed "to ensure prompt payment for such expenses" by Student Battalion members. Vol. II, p. 319.[1]

With respect to the factual assertion that, at the meeting held on January 6, 1988 in Washington, D.C., the UAE Ambassador Ahmed Salim Al Mokarrab "told the three MCI representatives that if the unauthorized calls were attributable to members of the Student Battalion, the UAE would assume responsibility and would pay MCI for the calls" (Pet. 4), Ambassador Mokarrab has denied that he ever made any such representations (Resp. App. 2a). The UAE's military attache, Lieutenant Colonel Mubarak Rashid Al Ghafli, who was also present at the January 6, 1988 meeting, has likewise denied that Ambassador Mokarrab ever made any such representations. (*Id.* 10a, 11a)

With respect to the factual assertion that, on February 17, 1988, the UAE military attache "informed an MCI manager that the UAE would 'definitely' compensate MCI for its losses if members of the Student Battalion were involved" (Pet. 4), again Colonel Mubarak has denied making any such representation (*Id.* 11a)

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[1] In any case, MCI appears to have abandoned its claim based on Note 5 of the Military Training Agreement. The Fifth Circuit below unanimously held that there was "nothing in the nature of [the Military Training Agreement], even considering the provisions of Note 5, that would constitute commercial activity" (Pet. App. 9a, 11a). MCI does not question this ruling of the court of appeals in its Petition.

## REASONS FOR DENYING THE PETITION

### I. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT THE UAE AND THE UAE MINISTRY OF DEFENSE DID NOT ENGAGE IN "COMMERCIAL ACTIVITY" WITH RESPECT TO THE ALLEGED PROMISES MADE TO MCI THROUGH DIPLOMATIC CHANNELS.

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-1611, mandates that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604 (emphasis added), "unless one of several statutorily defined exceptions applies." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). Thus, the FSIA provides the "sole basis" for obtaining jurisdiction over a foreign sovereign in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

Under the Act, "a foreign state is presumptively immune from the jurisdiction of United States courts[.]" *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. *Id.* at 355; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983).[2]

The only exception relied upon by MCI to overcome the presumption of sovereign immunity is the so-called "commercial activity" exception, which provides that a foreign state shall not be immune in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state[.]" 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" to mean

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[2] It is undisputed that the UAE and the UAE Ministry of Defense both qualify as "foreign state[s]" within the meaning of the FSIA. *See* 28 U.S.C. 1603(a), (b) (defining term "foreign state" as including "an agency or instrumentality of a foreign state").

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

Although this definition "leaves the critical term 'commercial' largely undefined," *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 612, the Court "has developed some additional guidelines." *Holden v. Canadian Consulate,* 92 F.3d 918, 920 (9th Cir. 1996). Thus, in view of the fact that the Act "largely codifies" the "restrictive" theory of foreign sovereign immunity, *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 612, a foreign state engages in commercial activity when it exercises "only those powers that can also be exercised by private citizens[,]" as opposed to those "powers peculiar to sovereigns." *Id.* at 614 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 704 (1976)). In other words, the commercial activity exception applies only in those instances where the sovereign acts " 'in the manner of a private player within' the market." *Saudi Arabia v. Nelson, supra,* 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 614).

MCI contends that the alleged promises made to MCI by the UAE Embassy's diplomatic officials in direct response to MCI's presentation of a petition for redress of grievances through diplomatic channels, namely that the UAE would pay certain debts owed by UAE citizen-soldiers *if* MCI agreed not to pursue legal action against such citizen-soldiers *and if* MCI presented adequate proof that in fact the said citizen-soldiers were responsible for the debts in question, constitute "commercial activity"

under this exception.[3] As will be shown below, however, the Fifth Circuit correctly held that the alleged acts of the UAE's embassy personnel in making conditional promises to pay in connection with the official consideration, investigation, and denial of MCI's petition for redress presented through diplomatic channels, was activity "clothed with a diplomatic nature, not a commercial one" (Pet. App. 8a). Moreover, MCI's contentions to the contrary notwithstanding, the Fifth Circuit's holding does not conflict with the general principles laid down in *Weltover* and *Nelson*, nor with the decisions of the other courts

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[3] As pointed out above, both Ambassador Mokarrab and Colonel Mubarak have denied making the representations in question (Resp. App. 2a, 11a). In addition, any agreement entered into between the UAE and MCI under the terms of which MCI was to refrain from prosecuting the members of the UAE Student Battalion in Texas state court for their alleged illegal use of telecommunications services while stationed at Ft. Bliss, Texas, would have been illegal and unenforceable under Texas law. *See Merrell v. Timmons*, 138 Tex. 250, 158 S.W.2d 278, 279 (1941); *Sriver v. McCann*, 155 S.W. 317, 320 (Tex. Civ. App.—Amarillo 1913, writ dism'd w. o. j.); 6A A. Corbin & J. Perillo, *Corbin on Contracts* § 1421 at 355, 358 (1962) ("A bargain the purpose of which is the stifling of a prosecution is in all cases contrary to public policy and illegal"; a settlement agreement is illegal "when a consideration is given in exchange for actual forbearance to prosecute or for a promise of such forbearance"; *see also Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301, 304 (Tex. 1981) ("A contract made in consideration of compounding a criminal offense is void because it is in contravention of the Penal Code and public policy"). In view of the illegality of the alleged agreement, it is also highly questionable whether either Ambassador Mokarrab or Colonel Mubarak had the authority to bind the UAE in such a transaction with a nonsovereign third party, and whether MCI's reliance on these diplomatic officials' apparent authority to bind the UAE was reasonable under the circumstances. *See First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189, 192-96 (2d Cir. 1989) (factual issue as to whether Antigua and Barbuda government's ambassador had apparent authority to obtain loan and waive government's sovereign immunity warranted setting aside default judgment against government).

of appeals. Consequently, MCI's petition should be denied.

## II. THE UAE EMBASSY ACTED IN A SOVEREIGN CAPACITY IN PASSING UPON MCI'S PETITION FOR REDRESS.

The proper inquiry in this case is whether the UAE Embassy, in passing upon and eventually denying MCI's petition for redress, "acted in a sovereign or essentially private capacity." *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985). For example, if an embassy or consulate steps out into the marketplace to order goods or services, or to lease real property, its conduct is essentially commercial and private in nature. *See* H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. at 16 (1976), *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 6604, 6615 (giving, as example of commercial activity, "a contract to make repairs on an embassy building");[4] *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987) (lease of residential property to be used as residence by consulate employees and their families), *cert. denied*, 485 U.S. 905 (1988). Similarly, an embassy or consulate acts like a private player in the marketplace when it hires or fires ordinary laborers, clerical staff, or public relations or marketing personnel, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16 (1976), *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 6604, 6615, since these employees are "not involved in any policy-making" or "privy to any governmental policy deliberations." *Holden v. Canadian Consulate, supra*, 92

[4] *But see Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 579 (7th Cir. 1989), wherein the Seventh Circuit stated, in dicta, that "although private entities often rehabilitate buildings to serve as office space, a foreign state's remodelling [sic] and operation of a chancery building is not a 'commercial' act, since the construction and operation of a diplomatic office are peculiarly sovereign activities."

F.3d at 922 (where consulate's employment of former commercial officer was "more analogous to a marketing agent," in that nature of her work, involving promotion of products, "is regularly done by private persons," her employment was a "commercial activity"; thus, consulate was not entitled to sovereign immunity under the FSIA from former commercial officer's action for wrongful termination).

On the other hand, if the embassy's conduct does not go beyond "the bounds of ordinary diplomatic behavior," *Transamerican Steamship Corp. v. Somali Democratic Republic, supra,* 767 F.2d at 1003, sovereign immunity attaches. Examples of such "ordinary," or what might be better termed "core," diplomatic behavior include (1) "hold[ing] [a] payment pending resolution of [a] dispute" between a host country company and an agency of the foreign country, (2) "attempt[ing] to mediate [a] conflict or negotiate a settlement between [third] parties," or (3) "attempt[ing] . . . to investigate the causes or merits of [a] dispute" between third parties. *Id.* Another traditional or core diplomatic function of a foreign embassy is to pass upon petitions to obtain redress for alleged grievances presented by host country nationals. *See id.* at 1001 (only "[w]hen efforts to obtain redress through diplomatic channels proved unsuccessful," did American shipping company bring suit against foreign state and foreign state agency).

In this case, the UAE embassy did not step out into the marketplace, or otherwise act as a private party, but rather engaged in traditional, ordinary, or core diplomatic behavior in passing upon and eventually denying MCI's petition for redress. After allegedly discovering that the perpetrators of certain unauthorized telephone calls were members of the UAE Student Battalion stationed at Fort Bliss, Texas, MCI admittedly decided "to attempt to deal with this matter on a diplomatic level" (Pet. App. 20a).

After meeting with the UAE ambassador and the UAE military attache at the UAE Embassy in Washington, D.C., Ambassador Mokarrab allegedly made a *conditional* promise that "*if* the unauthorized telephone calls were attributable to the members of the Student Battalion, the UAE would assume responsibility for the calls and . . . pay MCI for such services" (*id.* 21a (emphasis added)).

The UAE ambassador thereupon not only requested that MCI refrain from taking legal action against the members of the Student Battalion, but also asked that MCI "forward to him information relating to [MCI's] investigation and its claim that the unauthorized calls were placed by officers and enlisted men of the Student Battalion" (*id.*). Subsequently, the UAE ambassador telephoned MCI to inform it that "he had turned the information submitted by MCI over to Colonel Mubarak [the UAE Embassy's military attache] for investigation" (*id.* 22a). The UAE military attache thereafter requested additional information to back up MCI's claims, namely a written breakdown of the unauthorized telephone calls by destination (*id.*).

Eventually, the UAE military attache determined that "MCI had failed to prove that any individual Student Battalion member made any of the unauthorized telephone calls," which failure of proof the UAE ambassador termed "serious" (*id.* 23a, 24a). Moreover, after comparing a list of Student Battalion members that MCI had previously provided to the UAE ambassador with the UAE Embassy's own list of UAE personnel, the ambassador reported that at least 10% of the individuals on MCI's list were not UAE personnel (*id.* 24a). Thereafter, the UAE determined that it would not assume responsibility for paying for the unauthorized phone calls (*id.*).

Thus, the UAE Embassy engaged in ordinary or core diplomatic activity by essentially attempting to resolve or settle a dispute that had arisen between third parties

of different nationalities,[5] namely between MCI and certain members of the UAE Student Battalion accused by MCI of having engaged in a theft of its telephone services. The UAE Embassy undertook to investigate the merits of MCI's claims and accusations, and, based on the results of that investigation, determined to deny MCI's petition for redress. Because the embassy at no time entered the marketplace as a private person, but rather stayed strictly within the bounds of ordinary diplomatic behavior, the Fifth Circuit correctly decided that its actions were "clothed with a diplomatic nature, not a commercial one" (*Id.* 8a).

Moreover, the Fifth Circuit's decision comports with the D.C. Circuit's decision in *Transamerican*. In that case, the D.C. Circuit held that the Somali Embassy "exceeded the bounds of ordinary diplomatic behavior" by refusing to accept an American shipper's payment of disputed fees in the form of a check made out to a Somali-government-owned agency. Instead, the embassy instructed the American shipper to electronically transfer the payment directly into the Somali government's commercial bank account. The court emphasized that the embassy "did not hold the payment pending resolution of the dispute" between the American shipper and the Somali agency, "did not attempt to mediate the conflict or negotiate a settlement between the parties," and "apparently made no attempt even to investigate the causes or merits of the dispute." 767 F.2d at 1003. Rather, "[t]he embassy took an active rather than a passive role in the transaction," its activities being "essentially those of a collection agent," a "normal commercial function" that private banks and collection agencies perform "routinely." *Id.*

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[5] "Diplomacy" has been defined as including the "[n]egotiation or intercourse between nations through their representatives," *Black's Law Dictionary* 546 (4th ed. 1968), and "the skillful or successful settlement of differences between peoples." *Webster's Third New International Dictionary* 638 (1976).

By contrast, the UAE Embassy in the case at bar properly adopted a strict position of passive neutrality regarding the MCI-UAE Student Battalion members' dispute. The embassy attempted to resolve or settle the dispute between the parties and, as part of that effort, undertook to investigate the merits of MCI's claims that members of the Student Battalion had made illegal long-distance telephone calls. Only after completing a thorough investigation into the matter did the embassy determine that MCI had failed to prove its claims and that MCI's claims did not warrant redress. Thus, the Fifth Circuit's decision below granting sovereign immunity to such "ordinary diplomatic behavior" was perfectly consistent with the D.C. Circuit's decision in *Transamerican*.

MCI points to the determination of the district court (Pet. App. 17a) that "the UAE's actions in promising to pay restitution closely resembled those of a private employer that sought to extricate its overseas employees from legal difficulties in their host country" (Pet. 13). This analogy, however, is flawed for two fundamental reasons. First, the UAE Embassy was not attempting to extricate its own employees, i.e., embassy personnel, from legal difficulties with MCI; instead, it sought to resolve a dispute that had arisen between third parties. Second, a foreign embassy's act in passing on a host country national's petition for redress of grievances allegedly suffered at the hands of the foreign sovereign's nationals is a power peculiar to sovereigns, rather than one that can also be exercised by private citizens. Thus, while a United States company with offices overseas might unilaterally seek to extricate its own employees from trouble with the law in the host country, such a company has no power unilaterally to adjust grievances suffered as a result of criminal acts committed by foreign nationals in the United States. Rather, private parties, to obtain redress for such griev-

ances, must turn to either the United States Government [6] or to the foreign sovereign, through diplomatic channels.

In short, the Fifth Circuit correctly held that the promises *in question here* "made through diplomatic channels" did not exceed the bounds of ordinary or core diplomatic behavior and therefore did "not constitute commercial activity" (Pet. App. 7a). The Fifth Circuit did not purport to lay down a per se rule that any and all promises made through diplomatic channels will, whatever the circumstances of a particular case, constitute commercial activity. Rather, a careful reading of the court of appeals' opinion indicates that it was properly "sensitive to the particular facts of the case before it." *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 579 (7th Cir. 1989). Concededly, if a foreign sovereign were to use diplomatic channels to order or to contract for goods or services of the type that private parties routinely purchase, the foreign sovereign would not be entitled to immunity, as it would have exceeded the bounds of ordinary or core diplomatic behavior by entering the marketplace as a private player. In this case, however, the UAE did not use diplomatic channels to order or contract for goods or services from MCI. Moreover, the UAE Embassy did not seek to extricate its own employees from a dispute with MCI. Rather, the embassy sought to pass upon a host national's petition for redress, arising out of a dispute between third parties of different nationalities, a traditional sovereign function of diplomacy.

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[6] *See* U.S. Const. amend. I, guaranteeing to United States citizens the right "to petition the Government for a redress of grievances." It should be noted, however, that even this constitutional guarantee "is not a general waiver of sovereign immunity for citizens to petition the government in any regard in the federal courts of the United States." *Calhoun v. United States*, 32 Fed. Cl. 400, 405 (1994), *aff'd*, 61 F.3d 918 (Fed. Cir. 1995). Similarly, the fact that the UAE Embassy voluntarily agreed to consider MCI's petition for redress cannot be construed as amounting to a waiver of the UAE's sovereign immunity from suit in the courts of the United States.

## III. THE FIFTH CIRCUIT PROPERLY APPLIED THE "PRIVATE PERSON" TEST, AND ITS DECISION DOES NOT CONFLICT WITH EITHER *WELTOVER, NELSON*, OR THE DECISIONS OF OTHER COURTS OF APPEALS.

As noted above, a foreign state engages in commercial activity for purposes of the restrictive theory of sovereign immunity adopted by the FSIA "only where its acts 'in the manner of a private player within' the market." *Saudi Arabia v. Nelson, supra,* 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 614). Under this standard, which has been termed the "private party" test, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina v. Weltover, Inc.,* 504 U.S. at 614 (quoting *Black's Law Dictionary* 270 (6th ed. 1990) (emphasis in original)).

The Fifth Circuit properly concluded that the acts of the UAE were not of the type by which a private party engages in trade or commerce. As the Fifth Circuit pointed out, "MCI approached Defendants-Appellants not to form a contract for goods or services, but to try and recover its losses from the unauthorized use of its services by third parties" (Pet. App. 8a). The UAE did not respond to a contractual offer by MCI by promising to purchase goods or services, rather it conditionally promised to grant MCI's petition for redress of certain grievances, namely the alleged theft or unauthorized use of MCI's telephone services, *if* MCI both refrained from taking legal action and provided adequate proof that members of the UAE Student Battalion were responsible for the illegal acts in question. Only after the UAE had determined that MCI was unable to prove its charges to the satisfaction of the UAE Embassy and thus that MCI had not fully met the conditions attached to the UAE's initial promises, was its petition for redress denied.

MCI mischaracterizes the UAE's promises in response to its petition for redress as " 'garden variety' offers to settle a dispute" (Pet. 15). MCI was not attempting to settle a commercial dispute that had arisen between itself and the UAE, nor was it even attempting to obtain mediation of a commercial dispute between itself and a UAE-government-owned agency. Rather, MCI was petitioning the UAE through diplomatic channels in an effort "to try and recover its losses from the unauthorized use of its services *by third parties*" (Pet. App. 8a) (emphasis added), who, according to MCI's allegations, were UAE citizen-soldiers.

MCI further argues the UAE's promises conditionally granting its petition for redress are analogous to the agreement of a private employer in a foreign country to assume the debts incurred by its employees, "in order to preserve good relations with the host nation or to avoid disruption of its operations" (Pet. 15). Again, however, this was not a situation where the UAE Embassy promised to assume the debts of its own embassy employees or personnel; rather, the UAE Embassy passed upon a petition for redress involving a dispute between third parties in which the embassy was totally disinterested from a private or commercial standpoint. Moreover, MCI's speculation that the UAE's actions may have been undertaken with motivations similar to those of a private company operating in a foreign country, i.e., in order to preserve good relations with the United States as host country or to avoid disruption of the UAE's operations in the United States, improperly dwells upon the *purpose*, not the *nature*, of the UAE's acts. As this Court pointed out in *Weltover*, "the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose.' " *Republic of Argentina v. Weltover, Inc., supra*, 504 U.S. at 614 (quoting 28 U.S.C. § 1603(d)).[7]

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[7] MCI's analogy to parents offering to pay for illegal or overdue phone calls placed by their children (Pet. 15) is even further off

The Fifth Circuit itself properly focused on MCI's purpose in approaching the UAE in determining that the acts of the UAE were not "commercial activity." The Fifth Circuit essentially determined, based on the facts of and surrounding the transaction in question, that MCI did not make an offer "to form a contract for goods or services," a type of conduct engaged in by private parties, but rather presented, through diplomatic channels, a petition for redress "to try and recover its losses from unauthorized use of its services by third parties" (Pet. App. 8a), which petition was ultimately denied by the UAE by an exercise of power "clothed with a diplomatic nature" (*id.* (emphasis added)), and hence "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 614. Thus, the Fifth Circuit properly focused on the diplomatic "nature" of the UAE's acts and promises in considering and denying MCI's petition, not their purpose.

Even if it could be said that the Fifth Circuit considered the surrounding circumstances or "context" in which the alleged acts of the UAE took place, "[i]nsisting that a

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the mark. This is not a case where either the UAE ambassador or the UAE military attache offered to reimburse MCI for illegal phone calls made by friends or family members. Moreover, because a diplomatic official offering to pay the bills of a personal friend or family member would not be acting in an official capacity so as to qualify as a "foreign state" within the meaning of the FSIA, *see* 28 U.S.C. § 1603(a), (b); *Xuncax v. Gramajo,* 886 F. Supp. 162, 175 (D. Mass. 1995) (even if statute applies to individuals acting in their official capacity, FSIA did not apply to acts of defendant as Army Commander and Guatemalan Minister of Defense which "were beyond the scope of the official's authority"); *see also Chuidian v. Philippine National Bank,* 912 F.2d 1095, 1106 (9th Cir. 1990) (while holding that individual acting in his official capacity as member of Philippine commission formed to recover ill-gotten" wealth accumulated by former president of Philippines was entitled to sovereign immunity under FSIA, court stated that such individual "would not be entitled to sovereign immunity for acts not committed in his official capacity"), such a hypothetical situation would at most involve the doctrine of diplomatic immunity, not foreign sovereign immunity.

given act be judged in context before concluding whether it is commercial activity is not inconsistent with eschewing consideration of purpose." *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 726 (1995). Thus, in determining that the alleged transaction was not commercial activity, the Fifth Circuit could have properly considered that the alleged acts took place entirely outside a commercial context, thus precluding a finding of "commercial activity." *See* 30 F.3d at 168 ("Unless an act takes place in a commercial context it would be impossible to determine whether it is conducted in the manner of a private player in the market"). In other words, as there was no underlying commercial transaction or "market" to which the alleged promises of the UAE could relate, but rather only an illegal theft of telephone service, the UAE could not be said to have acted in the manner of a private player in the market.

Moreover, the Fifth Circuit's finding of a lack of an adequate "nexus" (Pet. App. 8a) merely referred to the fact that neither the UAE ambassador, the UAE Embassy, nor the UAE itself was at any time personally or directly interested in the subject matter of MCI's petition for redress. The affected members of the UAE Student Battalion were not employees of the UAE Embassy, ambassadorial family members, or otherwise associated with the embassy in any way. Moreover, to the extent the UAE Student Battalion members engaged in illegal or unauthorized use of MCI's services, they acted well beyond the scope of their employment as soldiers of the UAE and therefore stood in the position of "third parties" vis-a-vis the UAE.[8] Finally, no contract had been entered into be-

[8] MCI disputes the Fifth Circuit's characterization of the UAE Student Battalion members as "third parties," contending that this characterization "ignores the close practical and legal relationship between military personnel stationed overseas and their government" (Pet. 19 n.11). As the Fifth Circuit correctly pointed out, however, the making of unauthorized long-distance telephone calls "is not within the Student Battalion's scope of employment" as

tween the UAE (or the UAE Embassy) and MCI for the purchase of telecommunications goods or services. Thus, the actions undertaken by the UAE Embassy in an effort to resolve the dispute, including the conditional promises to pay allegedly made by the UAE ambassador, were neither private nor commercial, but purely diplomatic in nature.[9]

MCI further argues that the Fifth Circuit erred in failing to hold that the alleged promises met the "private party" test, as they amounted to "[p]romises to assume the responsibility for a preexisting debt" which "are regularly made and honored by private parties" (Pet. 20). Again, this analogy to private party behavior breaks down under close scrutiny.

First, even taking all of MCI's allegations as being true, the UAE, through its embassy, did not simply promise to pay the debts of the affected Student Battalion members. Rather, the UAE undertook seriously to consider and ren-

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soldiers stationed overseas (Pet. App. 10a). The affected Student Battalion members were acting as private citizens of the UAE with respect to any personal and illegal long-distance telephone calls they may have made while stationed in the United States. Thus, insofar as the UAE Embassy was concerned, the affected UAE Student Battalion members were as much "third parties" as if they had been a group of UAE citizen-tourists accused by MCI of having engaged in illegal telephone use while visiting the United States.

[9] The alleged promises made by the UAE Embassy personnel in considering MCI's petition for redress cannot reasonably be characterized, as did the dissenting circuit court judge, as "simply a contract for services while UAE felt it was morally obligated to enter into" (Pet. App. 14a). Again, the UAE Embassy was not acting out of a private moral obligation to reimburse MCI for the cost of services illegally used by persons for whom the embassy was directly responsible, e.g., its clerical staff or ambassadorial family members. Rather, the alleged promises were spurred by a sovereign, diplomatic impulse to resolve a dispute between third parties of different nationalities, namely between a United States telecommunications carrier and certain UAE citizen-soldiers temporarily stationed in the United States.

der a decision upon MCI's petition for redress presented through diplomatic channels, a core diplomatic function in which only sovereigns can engage in. This sovereign diplomatic activity involved (1) the entertainment of and a thorough consideration of the merits of MCI's petition for redress, (2) an extensive official investigation of MCI's charges, and (3) a decision by the UAE that, because MCI had not proved to the UAE's satisfaction misconduct on the part of the affected Student Battalion members, MCI's petition should be denied.

The alleged promises of the UAE's diplomatic representatives played, at most, only a small, incidental role in this essentially governmental and diplomatic activity of acting upon a host country national's petition for redress. Congress, in enacting FSIA, intended that the "essential nature" of given behavior be considered in determining whether it constitutes "commercial activity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at (1976), *reprinted in U.S. Code Cong. & Admin. News* 6604, 6615. This legislative history "makes clear that courts should not deem activity 'commercial' as a whole simply because certain aspects of it are commercial." *Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *cf. Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, supra*, 877 F.2d at 580 (in determining whether a transaction is commercial activity, "the court should concentrate on the 'basic exchange' embodied in the contract, rather than subsidiary provisions").

Second, even assuming *arguendo* that the promises made by the UAE Embassy's officials were "presumptively" commercial in character, it is well established that many "activities undertaken by a foreign state, although generally resembling conduct routinely engaged in by private parties, may also be labeled 'governmental' and immune from suit under the FSIA." *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, supra*, 887

F.2d at 579. For example, "while private persons routinely enter employment agreements, employment contracts between a foreign state and its civil servants, *diplomats* or military personnel are not 'commercial' transactions, since the employment of such personnel is intimately connected with the foreign state's formulation and execution of government policy." *Id.* (emphasis added); *see* H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. at 16 (1976), *reprinted in U.S. Code Cong. & Admin. News* 6604, 6615 (specifically noting that "the employment of diplomatic, civil service, or military personnel" is a "public or governmental," rather than commercial activity). In other words, "[b]ecause private parties cannot hire diplomatic, civil service or military personnel, such hiring is necessarily governmental." *Holden v. Canadian Consulate, supra,* 92 F.3d at 921.

Just as contracts for the employment of diplomats are governmental in character even though they generally resemble private employment contracts, conditional promises made by diplomats to pay debts incurred by third-party nationals of the country whose government the diplomat represents, if upon investigation such debts are found to be valid, are also governmental in character despite their surface resemblance to a private party's promise to assume the debts of another. Such promises are intimately connected with the foreign state's formulation and execution of diplomacy, a form of governmental policymaking.[10] Because private parties cannot engage in

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[10] By contrast, leasing space to be used as a residence for embassy employees and their families, *see Joseph v. Office of Consulate General of Nigeria, supra,* acting as a collecting agent for money owed to an agency of the foreign state, *Transamerican Steamship Corp. v. Somali Democratic Republic, supra,* or terminating the employment of a marketing agent or other nonpolicymaking employees, *Holden v. Canadian Consulate, supra,* are actions that are not closely connected with either the formulation or execution of diplomatic policy.

diplomacy, i.e., the official resolution of disputes between third parties of different nationalities, such diplomatic activity, including any promises to assume debts made in the course of such activity, are governmental in nature.

Nor is *Gemini Shipping v. Foreign Trade Organization for Chemicals & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981), to the contrary. *Gemini* involved the activity of two Syrian-government-owned agencies in purchasing rice from a private dealer and arranging with a Belgian corporation for the shipment of the rice to Syria. The Belgian shipper in turn hired a New York shipping firm to transport the rice. The Second Circuit held that the commercial activity exception applied to the Syrian-government-owned agencies' guarantee they would pay any demurrages incurred by the New York firm if its ship was detained while in port in Syria unloading the rice, even though the New York firm had no preexisting contractual relationship with these agencies.

*Gemini*, however, involved a purely commercial transaction for the sale and transport of rice, not a petition for redress presented by a host country national through diplomatic channels. The promise made by the Syrian agencies to guarantee the payment of demurrages was made through ordinary commercial channels, i.e., by telex, in response to a prior telex from the New York firm that it intended to exercise its contractual right of lien over the cargo due to its concern that the Belgian company would be unable to pay any demurrage should it be incurred. Syrian diplomats were never at any time involved in the transaction.

By contrast, the alleged promises in question here were "made through diplomatic channels" (Pet. App. 7a) in response to MCI's petition for redress, which was likewise presented through diplomatic channels. In addition, unlike in *Gemini* where two Syrian government agencies had previously entered into commercial transactions for the purchase and transport of the grain being shipped by the New York firm, there was no such preexisting commer-

cial transaction for the purchase and use of telecommunications services entered into by either the UAE or the UAE Defense Ministry. Again, the Fifth Circuit correctly determined that, since the underlying dispute in this case "related to services provided to third parties," not to the UAE or a UAE government agency, the UAE Embassy's attempt to resolve that dispute was clothed with a diplomatic nature, not a commercial one" (*Id.* 8a).

## CONCLUSION

The Fifth Circuit correctly applied the principles of *Weltover* and *Nelson* in determining that the "commercial activity" exception to the FSIA does not apply to conditional promises to pay made to a host national as part of the purely diplomatic activity involved in passing upon the host national's petition for redress. Private parties can neither engage in official government diplomacy to investigate and resolve disputes between third parties of different nationalities, nor consider and pass on petitions for redress of grievances presented through diplomatic channels, such conduct being "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc. supra,* 504 U.S. at 614. Moreover, MCI has failed to show that the Fifth Circuit's holding conflicts with the decisions of the other circuit courts of appeals regarding the application of the FSIA's "commercial activity" exception. 28 U.S.C. § 1605(a)(2). Consequently, MCI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 23, 1996

# APPENDICES

## APPENDIX A

## AFFIDAVIT

I, AHMED SALIM AL MOKARRAB, of P.O. Box 1, Abu Dhabi, United Arab Emirates, MAKE OATH and say as follows:

1. I hold the position of Director of the office of the Minister of State for Foreign Affairs of the United Arab Emirates in Abu Dhabi, and was appointed to this post in 1990.

2. During the period 1981-1989 I was the Ambassador Extraordinary and Plenipotentiary of the United Arab Emirates to the United States of America, in Washington.

3. There is now produced and shown to me (marked Exhibit AM1) what I am informed and verily believe is the front page of a "Complaint for Damages" instituted in the United States District Court for the Western District of Texas El Paso Division Civil Action No. EP-14-16C. That page lists the names of Defendants in the action. I have appended serial numbers against the names of these Defendants, and I have done this for the purpose of clarifying statements which I shall be making later in this my affidavit.

4. There is now produced and shown to me (marked Exhibit AM2) two pages carrying numbers 21 and 22 which I am informed and verily believe are extracts from the "Complaint for Damages" the front page of which is referred to in Paragraph 3 of this my Affidavit.

5. There is now produced and shown to me (marked Exhibit AM3) three pages carrying numbers 3, 4 and 5 which I am informed and verily believe are extracts from "Amended Points of Claim" in proceed-

ings instituted in the High Court of Justice Queen's Bench Division Commercial Court by MCI Telecommunications Corporation against the United Arab Emirates and the Ministry of Defence of the United Arab Emirates - Case Number 1991 Folio 2336.

6. I hereby declare that the statements in Paragraph 85 on the page marked 21 of Exhibit AM2 - to the effect that in January 1988 I had told the representative of MCI Telecommunications Corporation that if the allegedly unauthorized telephone calls were attributable to members of the UAE Student Battalion the UAE would assume responsibility for such unauthorized telephone calls and pay MCI Telecommunications Corporation for such services - is totally and absolutely false. I made no such statement or commitment whatsoever at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such statement or commitment, and to the best of my knowledge and belief, after careful inquiry and investigation, no such statement or commitment was ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

7. I hereby declare that during verbal discussions with officials of MCI Telecommunications Corporation on diverse dates in the spring of 1988 I indicated that while the UAE categorically and emphatically did not hold itself legally responsible to MCI Telecommunications Corporation for the alleged acts or omissions of members of its Student Battalion I would be prepared, in line with the overall mission and purpose of my post as Ambassador—namely to preserve and maintain the reputation of the UAE and of all personnel and institutions connected therewith, as well as to avoid any damage to relations with the host country, the USA, or to persons and organiza-

tions in it—I would give consideration, in appropriate cases, to making representations to individual members of the UAE Student Battalion to reimburse MCI Telecommunications Corporation for any charge or expense they had in fact incurred. I further declare that it was made clear on my part throughout my contacts with MCI Telecommunications Corporation that neither I nor the UAE authorities as such would wish to be in any way legally involved in this matter, or would hold ourselves legally committed in this regard.

8. I hereby declare that the statement in Paragraph 85 of Exhibit AM2—to the effect that I requested MCI Telecommunications Corporation to take no further legal action—is totally and absolutely false. I made no such request whatsoever at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such request, and to the best of my knowledge and belief, after careful inquiry and investigation, no such request was ever made by anybody on behalf of the UAE Embassy in Washington or on behalf of the UAE Government. I recall, however, that during contacts with MCI Telecommunications Corporation it was stated on behalf of MCI Telecommunications Corporation that unless I agreed to pay for what they considered to be unauthorized telephone calls made by members of the UAE Student Battalion MCI Telecommunications Corporation would inform the Press and the media in the USA and thereby initiate a campaign against the UAE which would be lurid and hostile and very damaging to the UAE and its relations with the host country, the USA. My response—to what I considered to be a threat and an act of blackmail—was that it would not help in ultimately promoting an amicable resolution of this matter. I further declare that I did not ask MCI Telecommunications Corporation to forbear from any-

thing, and I did not offer anything in return for any such alleged forbearance, and that I authorized no member of my staff whomsoever to make any such request to MCI Telecommunications Corporation, and that to the best of my knowledge and belief, after careful inquiry and investigation, no such request was ever made by anybody for on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

9. I hereby declare that the statement in Paragraph 86 of Exhibit AM2 about representations by me is totally and absolutely false. I made no such representations whatsoever at that time or at any other time berore or after that date, and I authorized no member of my staff whomsoever to make any such representations, and to the best of my knowledge and belief, after careful inquiry and investigation, no such representations were ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

10. I hereby declare that the statement in Paragraph 87 of Exhibit AM2—as regards representations by me —is totally and absolutely false. I made no such representations at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such representations, and to the best of my knowledge and belief, after careful inquiry and investigation, no such representations were ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

11. I hereby declare that the statement in Paragraph 88 of Exhibit AM2—that I had requested MCI Telecommunications Corporation to refrain from taking action in the case for another month—is totally and absolutely false. I made no such request whatsoever at that time or at any other time before or after

that date, and I authorized no member of my staff whomsoever to make any such request, and to the best of my knowledge and belief, after careful inquiry and investigation, no such request was ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government. I do recall, however, that in or about August 1988 MCI Telecommunications Corporation were informed verbally by me that the alleged evidence presented to the UAE Embassy in Washington by MCI Telecommunications Corporation had not, after very careful and thorough consideration, convinced me that the members of the UAE Student Battalion had in fact made the alleged telephone calls, and that, consequently, I would not use my good offices to pursue the matter any further.

12. I hereby declare that the statement in Paragraph 89 of Exhiibt AM2—that I assumed responsibility for and would pay for the alleged telephone calls—is totally and absolutely false. I made no such comment whatsoever at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such commitment, and to the best of my knowledge and belief, after careful inquiry and investigation, no such comment was ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

13. I hereby declare that the statement in Paragraph 13(i)(e) and (f) of Exhibit AM3—about an agreement on my part and an arrangement—is totally an absolutely false. I was never party to any such agreement or arrangement at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to engage in any such agreement or arrangement, and to the best of my knowledge and belief, after careful inquiry and

investigation, no such agreement or arrangement was ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

14. I hereby declare that the statement in Paragraph 13(iv) of Exhibit AM3—about express assurances of payment given by me—is totally and absolutely false. I made no such assurances, express or implied, at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such assurances, and to the best of my knowledge and belief, after careful inquiry and investigation, no such assurances were ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

15. I hereby declare that during the period relating to the claim by MCI Telecommunications Corporation in respect of the alleged improper telephone calls by members of UAE Student Battalion that Battalion comprised about 800 members. I further declare that to the best of my knowledge and belief other Middle East States also had student battalions in the same region numbering a total of approximately 2000 members.

16. I hereby declare that the names listed by MCI Telecommunications Corporation in Exhibit AM1 have been very carefully checked by be and by my staff, and that after making due allowances for any possible variations or inaccuracies resulting from the phonetic rendering of Arabic into English or from transliteration into English, and despite my own and my staff's collaborative efforts and desire to err in favour of identifying any name in the aforementioned list as that of a member of the UAE Student Battalion if at all reasonable or possible, we were forced to the conclusion that the names numbered 1, 2, 3, 6, 7,

11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24 and 25 (i.e., a total of 19 out of 25) could not be identified as members of the UAE Student Battalion. The remaining names and military ranks on the list appeared vagualy similar to those of persons who were members of the UAE Student Battalion, and in consequence the persons concerned were approached by the appropriate UAE Government officials in Abu Dhabi and thoroughly interrogated on the question of the utilization of MCI Telecommunications Corporation telephone services, and they all without exception claimed that they had never made use of MCI Telecommunications Corporation services at any time whatsoever.

17. I wish to state that a few months before MCI Telecommunications Corporation made the first intimation to the UAE Embassy in Washington about alleged improper telephone calls I was visited at the UAE Embassy in Washington by a gentleman who gained access to me as a result of representing to my staff that he was a senior official of MCI Telecommunications Corporation and that he wanted to see me on an important and urgent matter. I saw that gentleman—whose name I cannot recall, but I remember that he was Black with albino patches on his hands. He asked me to sign a document to the effect that MCI Telecommunications Corporation would become the sole representative and agent of the USA and the UAE. I rejected this offer and dismissed the gentleman.

SWORN in Abu Dhabi this 30th day of March 1993

By: /s/ Ahmed Salim Al Mokarrab
AHMED SALIM AL MOKARRAB

United Arab Emirates
Emirate of Abu Dhabi )
City of Abu Dhami ) ss:
Embassy of the )
United States of America

BEFORE ME:

/s/ Charles Robertson
CHARLES E. ROBERTSON, III
Consul of the
United States of America

## APPENDIX B

## AFFIDAVIT

I, MUBARAK RASHID AL GHAFLI, of P.O. Box 3519, Abu Dhabi, United Arab Emirates, MAKE OATH and say as follows:

1. I am a Lieutenant Colonel in the Armed Forces of the United Arab Emirates and hold the position of Protocol Officer at the General Headquarters of the Armed Forces in Abu Dhabi, and was appointed to this position in January 1991.
2. During the period November 1987 - September 1989 I was the Military Attache at the Embassy of United Arab Emirates in Washington.
3. There is now produced and shown to me (marked Exhibit MRG1) what I am informed and verily believe is the front page of a "Complaint for Damages" instituted in the United States District Court for the Western District of Texas El Paso Division Civil Action No. EP-14-16C. That page lists the names of Defendants in the action. I have appended serial numbers against the names of these Defendants, and I have done this for the purpose of clarifying statements which I shall be making later in this my Affidavit.
4. There is now produced and shown to me (marked Exhibit MRG2) two pages carrying numbers 21 and 22 which I am informed and verily believe are extracts from the "Complaint for Damages" the front page of which is referred to in Paragraph 3 of this my Affidavit.
5. There is now produced and shown to me (marked Exhibit MRG3) three pages carrying numbers 3, 4 and 5 which I am informed and verily believe are extracts from "Amended Points of Claim" in proceedings instituted in the High Court of Justice Queen's Bench Division Commercial Court by MCI Telecom-

munications Corporation against the United Arab Emirates and the Ministry of Defence of the United Arab Emirates - Case Number 1991 Folio 2336.

6. I hereby declare that the statement in Paragraph 86 of Exhibit MRG2 about representations by me allegedly reaffirming statements in Paragraph 85 of the same Exhibit is totally and absolutely false. I made no such representations whatsoever at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such representations, and to the best of my knowledge and belief, after careful inquiry and investigation, no such representations were ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

7. I hereby declare that the statement in Paragraph 87 of Exhibit MRG2 - as regards representations by me - is totally and absolutely false. I made no such representations at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such representations, and to the best of my knowledge and belief, after careful inquiry and investigation, no such representations were ever made by anbody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

8. I hereby declare that the statement in Paragraph 88 of Exhibit MRG2 - that the UAE Ambassador in Washington had requested MCI Telecommunications Corporation to refrain from taking action in the case for another month - is to the best of my knowledge and belief totally and absolutely false. I am not aware that the such request had been made by the Ambassador, and if it had been made by him at that time or at any other time before or after that date I would have become aware of that fact in the normal

course of my business at the Embassy. I further declare that I personally did not make any such request and that to the best of my knowledge and belief, after careful inquiry and investigation, no such request was ever made by anybody for or on behalf of the UAE Government.

9. I hereby declare that the statement in Paragraph 89 of Exhibit MRG2 - that I assumed responsibility for and would pay for the alleged telephone calls - is totally and absolutely false. I made no such commitment whatsoever at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to make any such commitment, and to the best of my knowledge and belief, after careful inquiry and investigation, no such commitment was ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

10. I hereby declare that the statement in Paragraph 13(i)(e) and (f) of Exhibit MRG3 - about an agreement on my part and an arrangement - is totally an absolutely false. I was never party to any such arrangement at that time or at any other time before or after that date, and I authorized no member of my staff whomsoever to engage in any such agreement or arrangement, and to the best of my knowledge and belief, after careful inquiry and investigation, no such agreement or arrangement was ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

11. I hereby declare that the statement in Paragraph 13(iv) of Exhibit MRG3 - about express assurances of payment given by me - is totally and absolutely false. I made no such assurances, express or implied, at that time or at any other time before or after that date, and I authorized no member of my staff whom-

soever to make any such assurances, and to the best of my knowledge and belief, after careful inquiry and investigation, no such assurances were ever made by anybody for or on behalf of the UAE Embassy in Washington or on behalf of the UAE Government.

12. I hereby declare that during the period relating to the claim by MCI Telecommunications Corporation in respect of the alleged improper telephone calls by members of UAE Student Battalion that Battalion comprised about 800 members. I further declare that to the best of my knowledge and belief other Middle East States also had student battalions in the same region numbering a total of approximately 2000 members.

13. I hereby declare that the names listed by MCI Telecommunications Corporation in Exhibit MRG1 have been very carefully checked by me and by my staff, and to my knowledge also by the UAE Ambassador in Washington, that after making due allowances for any possible variations or inaccuracies resulting from the phoentic rendering of Arabic into English or from transliteration into English, and despite my own and my colleagues collaborative efforts and desire to err in favour of identifying any name in the aforementioned list as that of a member of the UAE Student Battalion if at all reasonable or possible, we were forced to the conclusion that the names numbered 1, 2, 3, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24 and 25 (i.e. a total of 19 out of 25) could not be identified as members of the UAE Student Battalion. The remaining names and military ranks on the list appeared vagualy similar to those of persons who were members of the UAE Student Battalion, and in consequence the persons concerned were approached by the appropriate UAE Government officials in Abu Dhabi and thoroughly interrogated on the question of the utilization of

MCI Telecommunications Corporation telephone services, and they all without exception claimed that they had never made use of MCI Telecommunications Corporation services at any time whatsoever.

SWORN in Abu Dhabi this 30th day of March 1993

By: /s/ Mubarak Rashed Al-Ghafli
MUBARAK RASHED AL-GHAFLI

United Arab Emirates
Emirate of Abu Dhabi )
City of Abu Dhabi ) ss.
Embassy of the )
United States of America

BEFORE ME:

/s/ Charles Robertson
CHARLES F. ROBERTSON, III
Consul of the
United States of America

(3)

No. 96-434

Supreme Court, U.S.
FILED
NOV 1 1996
CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

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MCI TELECOMMUNICATIONS CORPORATION,
*Petitioner,*

v.

UNITED ARAB EMIRATES; MINISTRY OF DEFENSE, UNITED ARAB EMIRATES,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## REPLY BRIEF OF PETITIONER

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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## REPLY BRIEF OF PETITIONER

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Respondents offer no persuasive reason why the Court should not grant review of the Fifth Circuit's ruling construing the Foreign Sovereign Immunities Act (FSIA) and its "commercial activity" exception, 28 U.S.C. § 1605(a)(2). As MCI showed in its petition (pp. 8-21), the panel majority's ruling departs from the decisions of this Court and other circuits by announcing several broad new points of law, including the propositions that: (i) promises made through "diplomatic channels" are not enforceable in United States courts; (ii) a foreign government's promise to assume its citizens' debts to United States nationals is not a commercial activity; (iii) a promise to undertake an obligation owed by another party is not "commercial" absent a preexisting contractual relationship; (iv) forma-

tion and breach of a contract is not a "commercial" activity unless the parties have an overall commercial "nexus," and (v) transactions without a profit motive are not "commercial activities" under the FSIA. *See* Pet. 8-21.

Respondents made no serious attempt to defend these propositions or other aspects of the panel majority's actual decision. Instead, they seek to avoid the legal questions presented below by recasting the *factual* record upon which the court of appeals (like the district court) based its ruling. Throughout their brief, respondents seek (for the first time) to recharacterize what both courts below, properly relying on MCI's well-pleaded allegations, treated as the breach of a promise by respondents to MCI as the "denial" of a "petition for redress"—suggesting (wrongly) that the UAE ambassador was essentially acting as a "neutral" referee of a dispute between MCI and the UAE citizen-trainees.

Respondents' effort to re-invent the pertinent facts in this Court is obviously inappropriate given the procedural posture of this case. Because respondents chose not to appear in the district court to defend the action, a default judgment was entered against them (*see* Pet. App. 27a, 29a). As the court of appeals recognized, respondents thereby forfeited their right to defend on the merits. Pet. App. 6a (citing *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982)). For this reason, and because no hearing was ever held on issues relevant to jurisdiction, the "commercial activity" question was properly resolved by assuming the truth of plaintiff MCI's factual allegations, including the critical allegation that respondents made unambiguous promises to repay MCI for the unauthorized long-distance calls. Accordingly, both courts below decided the case on the basis of MCI's allegations. Pet. App. 6a-8a, 16a-17a.[1]

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[1] Although the district court plainly relied upon MCI's allegations in rejecting respondents' claim of immunity, *see* Pet. App. 16a-17a,

Respondents' reliance on self-serving, newly created factual allegations is nothing more than an attempt to avoid the important legal issues raised by the court of appeals' decision.

Rather than addressing the legal bases of the court of appeals' decision, respondents contend that when the UAE officials made the disputed representations to MCI, they were acting as neutral governmental arbiters of a dispute between third parties (*i.e.*, MCI and the UAE trainees). Respondents assert that "the UAE Embassy engaged in ordinary or core diplomatic activity by essentially attempting to resolve or settle a dispute that had arisen between third parties of different nationalities," Br. in Opp. 8-9, and refer to the critical events in suit as "making conditional promises to pay in connection with the official consideration, investigation, and denial of MCI's petition for redress." Br. in Opp. 5.[2] *See id.* at 7 (describing relevant activity as "passing upon and eventually denying MCI's petition for redress"); 10 ("passing on a host country national's petition for redress of grievances allegedly suffered at the hands of the foreign sovereign's nationals"); 20 ("passing upon the host national's petition for redress"). *See also* Br. in Opp. 17 (asserting that the ambassadorial promises on which MCI's lawsuit was based "played, at most, only a small, incidental role in this essentially governmental and diplomatic activity of

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respondents never requested the court of appeals to remand the case for a hearing to resolve any factual disputes affecting jurisdiction under the FSIA.

[2] The phrase "petition for redress," although used repeatedly in respondents' Brief in Opposition, was not used earlier in this proceeding, whether by parties, lawyers, or judges. There is no sign that any party understood the dealings between UAE officials and MCI as involving any such "petition."

acting upon a host country national's petition for redress").[3]

Neither court below embraced respondents' present version of the facts, and for good reason. Respondents' rendition depends upon a peremptory rejection of MCI's factual allegations. According to MCI's submissions, *see* Pet. App. 20a-24a, 46a-47a, respondents actively inserted themselves into the dispute by promising to pay MCI for the unauthorized telephone calls if MCI took no legal action against the UAE military trainees in question and provided respondents with documentation reflecting the unauthorized calls. This promise contained no proviso reserving to respondents the right to insist upon ever-higher standards of documentation, or to deny the facts even after exhaustively presented by MCI's records, or to deny MCI *all* reimbursement based upon a claim that *ten percent* of the persons listed on the MCI records were not UAE trainees (*see* Br. in Opp. 8). None of these actions had anything to do with the "skillful or successful settlement of differences between peoples," Br. in Opp. 9 n.5 (quoting dictionary definition of "diplomacy"). To the contrary, these actions were nothing more than transparent pretexts for respondents' repudiation of their commitment to pay MCI.

Respondents attempt to minimize the community of interest between them and the UAE citizen-trainees, *see* Br. in Opp. 13-16 nn.7-8, but never explain why, even if the citizen-trainees are regarded as "third parties," respondents' solemn promise to pay their debts does not qualify as "commercial activity" under the governing

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[3] This Court has made clear that formal categories do not substitute for a careful analysis of whether the "particular actions," *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992), in question are of a type "peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993). Stripped of the conclusory labels, respondents' conduct amounts to nothing more than the "making and breaching of a contract with MCI." Pet. App. 14a (Garza, J., dissenting).

"private person" standard. *See* Pet. 14-16. Respondents' conclusory statement that respondents were "totally disinterested from a private or commercial standpoint" in MCI's dispute with the UAE military trainees (Br. in Opp. 13) is another example of their improper reliance on disputed factual contentions. It is also plainly wrong: the UAE citizen-trainees responsible for the illegal calls were employees of respondent UAE Ministry of Defense, and the ambassador was the official representative of these employee-citizens. Respondents were far from "neutral" for the additional reason that Note 5 of the Military Training Agreement made the UAE responsible for trainees' unpaid living expenses (*see* Pet. 3). Whether or not that agreement was ultimately determined to be enforceable in court by a private party (*see* Pet. App. 8a), the UAE's clear legal responsibility under Note 5 to pay for any calls attributable to its trainees further demonstrates the absurdity of any claim that the UAE ambassador came to this matter as a "totally disinterested" neutral.

If the parties had agreed or understood that the UAE ambassador's role would be that of a neutral arbitrator *between* MCI and the UAE trainees, rather than as partisan negotiator, this would of course be a very different case under the FSIA (indeed, MCI might not have a valid claim on the merits). But that hypothetical, which is the basis for respondents' entire Brief in Opposition, is simply irrelevant because it is not what MCI alleged or what the courts below based their rulings upon. MCI did not claim that respondents undertook to intercede with the trainees to try to persuade *the trainees* to pay MCI. What MCI alleged, and the predicate for both the district court's and the court of appeals' rulings, is that the UAE officials themselves made and then broke a promise to pay MCI. Respondents' repeated suggestions that these officials were

in effect acting in an adjudicatory capacity, *e.g.*, Br. in Opp. 19, are far off the mark.[4]

Respondents' flight from the operative factual allegations also colors their treatment of the conflicting decisions of other courts. For example, after correctly noting the D.C. Circuit's reliance on an Embassy's "active role" in business dealings as grounds for *denying* immunity in *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 574 (7th Cir. 1989), respondents attempt to distinguish *Transamerican* on the ground that here the UAE embassy "adopted a strict position of passive neutrality regarding the MCI-UAE Student Battalion members' dispute." Br. in Opp. 9-10. But that is a preposterous misstatement of the governing factual allegations. Rather than adopting a passive and neutral approach with respect to the "dispute," the UAE ambassador affirmatively promised to pay for the unauthorized calls and demanded in return that MCI refrain from pursuing its legal remedies against the UAE citizen-trainees. By inducing MCI to defer action on the unauthorized calls, the UAE not only protected its employees and citizens, but also avoided a potential lawsuit against itself from MCI (or action by the United States Department of Defense) under Note 5 of the Military Training Agreement. MCI and the UAE ambassador confronted each other not as "petitioner" and tribunal, but as negotiators with openly adverse interests. Respondents' role in making and break-

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[4] In addition to being *irrelevant* to the jurisdictional issue given the procedural posture of this litigation, respondents' newly minted version of the facts is wholly implausible. If all MCI was to get from its dealings with UAE officials was a right to have those officials, in their absolute and unreviewable discretion, "adjudicate" MCI's complaints against UAE nationals, MCI would surely not have acted as it did. After all, MCI had a right to pursue remedies against the illegal telephone callers in United States courts. MCI gave up that right not because the UAE embassy would provide MCI with an adjudicative forum preferable to a United States civil court, but because *UAE officials expressly promised to pay MCI's damages* if MCI agreed to forgo legal action.

ing their promise to MCI was plainly *more* "active" than that of the Somali embassy in *Transamerican.*[5]

Even the Court of Appeals majority did not attempt to shoe-horn the facts as alleged by MCI into the form of an essentially governmental "mediation" or adjudication of a "petition for redress." As demonstrated in MCI's petition, the panel majority instead rested its decision upon a set of novel and highly restrictive *legal* prerequisites for "commercial activity." *See* Pet. 8-9. It is telling that respondents do not defend those novel legal rulings, which clearly call for review by this Court.[6]

Respondents conspicuously do not cite any authority to support the panel majority's holding that, in addition to showing that the UAE officials had made a legally binding promise, MCI had to show a "nexus" between itself and the UAE officials to bring the case within the commercial activities exception. *See* Pet. App. 8a. Respondents speculate (Br. in Opp. 15) that the court meant to refer to "the fact that neither the UAE ambassador, the

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[5] Respondents contend that the panel majority's unqualified declaration that "promises made through diplomatic channels do not constitute diplomatic activity," Pet. App. 7a, was tacitly limited to the special case of a "petition for redress." *See* Br. in Opp. 11. But the court's broad pronouncement cannot be so easily constrained. As already explained, *supra* pp. 2-3, the court of appeals plainly did *not* (and given the posture of the case, *could* not) rely on the "petition for redress" theory.

[6] Respondents now suggest for the first time that an agreement under which MCI would not press for prosecution of the delinquent UAE citizen-trainees would have been void under Texas law (Br. in Opp. 5 n.3). The cases respondents cite (*e.g., Merrell v. Timmons*, 158 S.W.2d 278 (Tex. 1942)), however, are wildly inapposite. Among other things, it is clear that law enforcement authorities here were already well aware of the illegal telephone calls, and it was *they* who asked MCI to come to a decision concerning restitution and whether to go forward with criminal prosecution. *See* Pet. App. 23a. In any event, respondents forfeited any "illegal contract" defense by defaulting, and the fact that they may seek to assert it on remand in no way militates against granting review on the jurisdictional question presented by the decision below.

UAE Embassy, nor the UAE itself was at any time personally or directly interested in the subject matter of MCI's petition for redress." But even if respondents' hypothesized explanation of the panel majority's "nexus" requirement were accurate, which it plainly is not, *see supra* pp. 2-3, that requirement was an unwarranted departure from this Court's instructions. The governing test is whether the government has exercised "powers that can also be exercised by private citizens." *Nelson*, 507 U.S. at 360. An otherwise enforceable promise to pay another person's debt is binding regardless of whether the promisor has a "direct" or "personal" relationship to the debtor or a prior relationship to the creditor. *See, e.g.*, 3 Richard A. Lord, *Williston on Contracts* § 7.19 at 370-71 (4th ed. 1992) (discussing, *inter alia*, promises by guarantors and promises made "in exchange for a forbearance to exercise some right against a third person"). The panel majority's unprecedented "nexus" requirement is inconsistent with the standards this Court has set down for judging "commercial activity." *E.g.*, *Weltover*, 504 U.S. at 614.

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Respondents' current efforts to change the subject notwithstanding, the court of appeals clearly misconstrued the commercial activity exception in a number of important respects that call for review by this Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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